No. 00-361-CFX Title: Margaret Kelly Michaels, Petitioner
v.
George McGrath, et al.

Docketed: September 7, 2000 Court: United States Court of Appeals for the Third Circuit

Entry	Date	Proceedings and Orders
	Aug 30 2000	Petition for writ of certiorari filed. (Response due October 30, 2000)
	Aug 30 2000	Supplemental Appendix of petitioner filed.
	Sep 28 2000	Order extending time to file response to petition until October 30, 2000.
	Sep 28 2000	This extension is granted for all respondents.
	Oct 3 2000	Brief of respondent Susan Esquilin in opposition filed.
	Oct 12 2000	Brief of respondent Louis Fonnelaras in opposition filed.
	Oct 25 2000	Brief of respondents George McGrath and Richard Mastroangelo in opposition filed.
	Oct 26 2000	Brief of respondent Sara Sencer-McArdle in opposition filed.
	Nov 8 2000	DISTRIBUTED for Conference of November 22, 2000
	Nov 27 2000	REDISTRIBUTED for Conference of December 1, 2000
	Dec 4 2000	REDISTRIBUTED for Conference of December 8, 2000
	Jan 2 2001	REDISTRIBUTED for Conference of January 5, 2001
	Jan 8 2001	REDISTRIBUTED for Conference of January 12, 2001
	Jan 16 2001	Petition DENIED. Dissenting opinion by Justice Thomas. (Detached opinion.)

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Supreme Court, U.S.
FILED

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No. _____

In The

Supreme Court of the United States

MARGARET KELLY MICHAELS,

Petitioner,

v.

GEORGE McGRATH, RICHARD MASTROANGELO, SARA SENCER-McARDLE, LOUIS FONNELARAS, AND SUSAN ESQUILIN,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does an individual have constitutionally protected rights, which are violated when improperly obtained statements of third parties, that constitute the sole basis of criminal charges, are used against her to secure indictments, arrest, pre-trial confinement, trial and post trial incarceration?

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, petitioner, Margaret Kelly Michaels, states she is a private individual with no affiliation to a corporation, parent company or subsidiary.

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PETITION FOR WRIT OF CERTIORARI

Margaret Kelly Michaels ("Michaels" or "Plaintiff") respectfully prays that a Writ of Certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Third Circuit entered in this proceeding on June 5, 2000, in order to resolve the conflict between the majority of the Seventh Circuit's Opinion in *Buckley v. Fitzsimmons*, 20 F.3d 789 (7th Cir. 1994), *cert. denied*, 513 U.S. 1085, 115 S.Ct. 740, 130 L. Ed. 2d 642 (1995) and the dissenting opinion regarding the issue as to whether a criminal defendant has constitutionally protected rights which are violated when improper interrogation techniques are used against third persons, as the sole basis for the indictment, pre-trial confinement and conviction of a criminal defendant.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit that gives rise to this petition may be found reprinted in Appendix A hereto (App. A 1a-13a). By order filed June 5, 2000, the Court of Appeals affirmed the judgment of the district court entered May 26, 1999. The opinion of the district court has been published and may be found at *Michaels v. State of New Jersey, et al.*, 50 F. Supp. 2d 353 (D.N.J. 1999).

The underlying criminal matter which gave rise to the federal civil rights action has generated two published state court opinions:

State v. Michaels, 264 N.J. Super. 579 (App. Div. 1993) and *State v. Michaels*, 136 N.J. 299 (1994).

BASIS FOR JURISDICTION

On May 26, 1999, the district court entered an order dismissing the federal causes of action against the defendants. Michaels timely appealed to the Third Circuit, which affirmed the opinion filed on June 5, 2000. Pursuant to Supreme Court Rule 13.1, this petition has been filed within 90 days of the Third Circuit's Order.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

STATUTE INVOLVED IN THIS CASE

42 U.S.C. §1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, or any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

This litigation arises out of the wrongful indictment, arrest, pre-trial incarceration, conviction, and subsequent incarceration of the petitioner Margaret Kelly Michaels ("Michaels" or "Plaintiff").

FACTUAL BACKGROUND

The factual backdrop and procedural history of this matter have been set forth in detail in *State v. Michaels*, 264 N.J. Super. 579 (App. Div. 1993) and in *State v. Michaels*, 136 N.J. 299 (1994) as well as the United States District Court's decision, *Michaels v. State of New Jersey, et al.*, 50 F. Supp. 2d 353 (D.N.J. 1999).

Immediately upon being charged in an initial indictment alleging child sexual abuse, Michaels was arrested and incarcerated in the county jail. Bail was set at that time. However, given the amount of the bail, Michaels was unable to obtain her release until approximately 2 months later. Thereafter, two additional indictments were issued. Then, in December 1985, Michaels' bail was revoked and she was readmitted to county jail where she remained incarcerated for over one month until bail was reinstated.

Subsequent to trial, Michaels spent five years in prison as a result of being convicted of numerous counts

of child sexual abuse. After serving five years in prison, more than one of which was in solitary confinement, the New Jersey appellate court reversed her conviction. *State v. Michaels*, 264 N.J. at 645. That reversal was appealed by the State to the New Jersey Supreme Court, which affirmed the reversal of the conviction. See *State v. Michaels*, 136 N.J. at 324.

By way of background, in September 1984, Michaels, then 22 years old, was hired as a teacher's aid for pre-schoolers.

During a routine pediatric examination, a four-year-old child in Michaels' class made a statement which was misconstrued and initiated the allegations of sexual abuse against Michaels. See *State v. Michaels*, 136 N.J. at 304.

Thereafter, an initial investigation spearheaded by the Essex County Prosecutor's office resulted in several indictments and ultimately, after a nine month, highly publicized trial, a conviction. The investigating individuals, prosecutors, and the investigative techniques they employed were highly criticized by both the appellate court and Supreme Court of the State of New Jersey. The New Jersey Supreme Court held that "interrogations that occurred in this case were improper and there is substantial likelihood that the evidence derived from them is unreliable." *State v. Michaels*, 136 N.J. 299, 324 (1994). The appellate court concluded that the interrogations that had been conducted were "highly improper." *State v. Michaels*, 264 N.J. Super. at 629.

Further, the New Jersey Supreme Court found that "many of the interviews demonstrated ineptness in dealing with the challenges presented by pre-schoolers, and

displayed their frustration with the children." *Id.* at 313-314. As a result of the New Jersey state courts' opinions, the Essex County Prosecutor then issued a dismissal on December 1, 1994, in effect dropping all of the charges against Michaels. (App. 6a).

42 U.S.C. §1983 CIVIL CASE

On June 13, 1996, Michaels filed a Complaint in the Superior Court of New Jersey against numerous Defendants alleging various causes of action, including malicious prosecution and civil rights violations sounding in common law as well as 42 U.S.C. §1983 causes of action. Thereafter, the Defendants removed this matter to the Federal District Court of New Jersey. (App. 6a-7a).

Subsequently, numerous counts and defendants were dismissed by consent of the Plaintiff or by order. (App. 7a). Two causes of action remained, namely, malicious prosecution and §1983 causes of action. The remaining defendants; Sarah Sencer-McArdle, an Essex County Prosecutor; Louis Fonolleras, an investigator for the State agency, Division of Youth and Family Services; George McGrath, an Essex County Investigator; Richard Mastrangelo, an Essex County Investigator; and Dr. Susan Esquilin, a psychologist hired to participate in the investigation by the Essex County Prosecutors Office, all moved before the district court to establish immunities and for summary judgment on the federal malicious prosecution causes of action. (App. 7a).

On May 26, 1999, the Honorable Maryanne Trump Barry, U.S.D.J. issued an order granting defendants'

motion for summary judgment and remanding the common law malicious prosecution claim to the Superior Court of New Jersey. An opinion was filed on May 26, 1999 and subsequently published. See *Michaels v. State of New Jersey*, 50 F. Supp. 2d 353 (D.N.J. 1999). (App 7a).

Plaintiff filed a Notice of Appeal to the United States Court of Appeals for the Third Circuit on June 21, 1999. (App. 7a). Thereafter, the United States Court of Appeals for the Third Circuit issued a judgment on June 5, 2000, affirming the judgment of the district court. The court issued an opinion also on June 5, 2000, finding that

> The district court did not err in concluding that Michaels did not demonstrate a violation of her constitutional rights when the defendants employed improper interview techniques with the children. Thus, all of the defendants are entitled to qualified immunity for those acts. Furthermore, Ms. Sencer-McArdle is entitled to absolute immunity for offering the testimony of the children against Michaels before the grand jury in that trial. (App. 12a)

Plaintiff now prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals.

REASONS FOR GRANTING THE WRIT

THE COURT OF APPEALS' DECISION LEAVES AN ENTIRE CLASS OF CRIMINAL DEFENDANTS WITHOUT THE BENEFIT OF §1983 REDRESS BY FINDING THAT CONSTITUTIONALLY PROTECTED RIGHTS DO NOT EXIST WHEN IMPROPERLY OBTAINED STATEMENTS OF THIRD PARTIES ARE USED AGAINST THEM IN A CRIMINAL PROSECUTION

The Court of Appeals' decision is based on the district court's decision which leaves an entire class of criminal defendants without the benefit of §1983 redress by finding that constitutionally protected rights do not exist when improperly obtained statements of third parties are used against them in a criminal prosecution. The Seventh Circuit's majority opinion in *Buckley v. Fitzsimmons*, 20 F.3d 789 (7th Cir. 1994) *cert. denied*, 513 U.S. 1085, 115 S.Ct. 740, 130 L. Ed. 2d 642 (1995) directly conflicts with the dissenting opinion regarding the existence of a criminal defendants' rights and is inconsistent with the broad scope of the intended civil remedies for a criminal defendant pursuant to 42 U.S.C. §1983. Further, the majority opinion in *Buckley* is inconsistent with the Tenth Circuit's opinion in *Clanton v. Cooper*, 129 F.3d 1147 (10th Cir. 1997). Finally, the Third Circuit attempted to distinguish this matter from the *Clanton* matter, but relied on an erroneous impression that evidence, other than the statements arising out of the improper interrogations, existed to support the criminal investigation and prosecution of Michaels.

The decision below requires review as it relies on the majority holding of the Seventh Circuit's opinion in *Buckley v. Fitzsimmons* which also contains a dissenting opinion completely contrary to the majority as to whether a criminal defendant's rights are violated when improper interrogation methods are employed against third persons to implicate the defendant. The dissenting opinion held that if a Plaintiff can demonstrate that the indictment and trial would not have occurred, but for, the wrongful conduct which occurred during the investigation stage, the prosecution should not be immune for their non-advocacy wrongful conduct. *Buckley*, 20 F.3d at 800, (Fairchild, J., dissenting). Here, Michaels was indicted, suffered pre-trial incarceration and more than five years of post-trial incarceration, solely based on wrongful conduct which occurred during the investigation stage.

The Third Circuit affirmed the district court's opinion that the defendants were entitled to qualified immunity because the interview techniques they employed did not violate Michaels' constitutional right to due process under the Fourteenth Amendment. (App. 12a). The rationale of the district court, which was affirmed by the Third Circuit, was adopted from the Seventh Circuit's holding in *Buckley v. Fitzsimmons*. The Court in *Buckley* held that coercion of witnesses in a criminal investigation is a constitutional wrong that violates the rights of the person being interrogated. However, according to *Buckley* the rights of the criminal defendant are not implicated until those coerced statements are used at trial. In *Buckley*, the Court held that using those statements at the criminal defendant's trial violates the defendant's rights under the

Due Process Clause, but at that time, the prosecutors are entitled to absolute immunity for their actions. The dissent in *Buckley* suggested that prosecutors should not be immune from liability for their role in the investigation stage, if the plaintiff can show that the indictment and trial would not have occurred, but for the wrongful conduct employed in the investigation. *Buckley*, 20 F.3d at 800 (Fairchild, J., dissenting).

Further, the Tenth Circuit's opinion in *Clanton v. Cooper*, 129 F.3d 1147 (10th Cir. 1997) held that the Plaintiff had standing to assert a constitutional violation of his rights based upon a witness' coerced confession. Accordingly, the Court in *Clanton* held that a criminal defendant has standing to challenge the government's use of a coerced confession given by a third person against the criminal defendant. The finding of the Third Circuit, here, is inconsistent with *Clanton*.

The Third Circuit's opinion in this matter attempted to distinguish *Buckley* and *Clanton* by citing the *particular use* of the improperly obtained statements. The Third Circuit noted that the witness' coerced statements were only used at trial in *Buckley*. There, the Court held that the prosecutor was absolutely immune from action for damages under §1983. In *Clanton*, the police used the third persons' coerced statement in an affidavit to support an arrest warrant for the defendant. The Court in *Clanton* held that using an improper statement in that context, renders the officers without entitlement of qualified immunity.

However, this distinction is without basis here. The Third Circuit states, "the only use of the improperly

obtained statements against Michaels was the presentation of the children's testimony before the grand jury and at the criminal trial." (App. 9a). The Court further found that "[u]ntil the children testified against her, Michaels's constitutional right to due process was not violated by the techniques used to interview the children." (App. 11a-12a). However, although the erroneous finding by the Third Circuit is not the sole basis of our argument, we are compelled to point out that the improperly obtained statements were not only used before the grand jury and at the trial; they were used as the *sole support* for the entire criminal investigation and relied upon to secure the indictment, arrest and pre-trial incarceration of Michaels. Therefore, pursuant to the mandate of *Clanton*, neither the investigators nor the prosecutors should be immune from liability for their role in obtaining the improper statements.

Further, even if the Third Circuit's finding that Michaels' rights were only implicated during the trial is accurate as the dissent in *Buckley* suggested, the defendant prosecutor should not be immune from liability for her non-advocacy wrongful conduct during the investigation stage as Michaels can demonstrate that the indictment and trial would not have occurred "but for the wrongful conduct of defendant." See *Buckley*, 20 F.3d at 800 (Fairchild, J., dissenting).

In addition, the majority opinion in *Buckley* is flawed because it leaves a Plaintiff in a §1983 action, such as this, without civil recourse. Here, the Third Circuit recognized the correctness of Plaintiff's argument. (App. 9a). However, the Third Circuit relied upon the justification that the "policies served by granting absolute prosecutorial

immunity outweighed any gap in the plaintiff's recovery." (App. 9a), citing *Imbler*, 424 U.S. at 427. The court indicated that the falsely charged defendant was remedied by various "safeguards built into the judicial system – probable cause hearings, dismissal of charges – and into state codes of professional responsibility." (App. 10a), quoting *Kulwicki v. Dawson*, 969 F.2d 1454 (3d Cir. 1992).

However, such safeguards built into the judicial system only protect the continued wrongful incarceration of an improperly convicted defendant. 42 U.S.C. §1983 provides civil remedies for such improperly convicted defendants. This Court has held that the coverage of §1983 must be broadly construed. See *Dennis v. Higgins*, 496 U.S. 439, 111 S.Ct. 865, 112 L. Ed. 2d 969 (1991). Further, the Ninth Circuit Court of Appeals has held that §1983 was designed as a comprehensive remedial legislation for the deprivation of federal, constitutional and statutory rights. *Green v. Dumke*, 480 F.2d 624 (9th Cir. 1973). Finally, the Second Circuit Court of Appeals held that §1983 should be interpreted with sufficient liberality to fulfill its purpose of providing federal remedy in protection of a federal right. *Birnbaum v. Trussell*, 371 F.2d 672, (2d Cir. 1988).

Accordingly, the Third Circuit's conclusion that plaintiff had redress because her conviction was dismissed is inconsistent with the intent of 42 U.S.C. §1983 action. It also leaves a whole class of wrongfully accused defendants without civil recourse; which is also contrary to the intent of §1983.

Finally, this case should be reviewed, as the Third Circuit's opinion is inconsistent with the mandate of

§1983 action, by improperly stating that Michaels had no constitutional right to protect and is egregiously factually flawed, by stating the only use of the improper statements were at trial.

CONCLUSION

For the foregoing reasons, Petitioner respectfully urges this Court to grant the writ and to review the Judgment and Opinion of the Court of Appeals for the Third Circuit.

Respectfully Submitted,

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Filed June 5, 2000

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 99-5486

MARGARET KELLY MICHAELS

v.

STATE OF NEW JERSEY; ATTORNEY GENERAL'S OFFICE; COUNTY OF ESSEX; ESSEX COUNTY PROSECUTOR; GEORGE L. SCHNEIDER, ESQ.; HERBERT TATE, ESQ.; JOHN MASTROANGELO; JOHN NOONAN; GLENN GOLDBERG, ESQ.; SARAH SPENCER-MCARDLE; EILEEN C. TREACY, M.A.; THE ESSEX COUNTY POLICE DEPARTMENT; NEWARK POLICE DEPARTMENT; DIVISION OF YOUTH AND FAMILY SERVICES; LOUIS FONNELARAS; SUSAN ESQUILLAN; "JOHN DOES", 1 THROUGH 20 (FICTITIOUS PERSONS); "JOSEPH DOES", 1 THROUGH 20 (FICTITIOUS PERSONS); "JAMES DOES"; "JANE DOES", 1 THROUGH 20 (FICTITIOUS PERSONS); "HARRY DOES", 1 THROUGH 20 (FICTITIOUS PERSONS); GEORGE MCGRATH

SUSAN ESQUILLAN

Defendant/Third-Party Plaintiff

v.

THE HEALTH CARE INSURANCE COMPANY

Third-Party Defendant

On Appeal from the United States District Court
for the District of New Jersey
(D.C. Civ. No. 96-03557)
District Judge: Honorable Maryanne Trump Barry

Argued: March 21, 2000

Before: MANSMANN and GREENBERG, *Circuit Judges*
and ALARCON, Senior Circuit Judge*

(Filed: June 5, 2000)

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* The Honorable Arthur L. Alarcon, Senior Judge of the United States Court of Appeals for the Ninth Circuit, sitting by designation.

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OPINION OF THE COURT

ALARCON, *Senior Circuit Judge*.

Margaret Kelly Michaels ("Michaels") appeals from the order granting the defendants' motion for summary judgment and dismissing her § 1983 claims against them. Michaels alleged that the defendants violated her constitutional rights by employing coercive interview techniques with child witnesses while investigating allegations of child abuse made against her. The district court granted the defendants' motions for summary judgment on three alternative grounds. First, the district court found that the defendants were entitled to qualified immunity because Michaels's allegations that the defendants engaged in an improper investigation did not allege a violation of her constitutional rights. The district court then ruled that even if the improper investigation did violate her constitutional rights, the defendants would nonetheless be entitled to qualified immunity because those rights were not clearly established at the time of the investigation such that a reasonable person in the defendants' position would have known that they were violating her rights. Finally, the district court concluded that, putting the issue of qualified immunity aside, Michaels's § 1983 malicious prosecution claim must be dismissed for failure to state a claim. Michaels contends that each one of the district court's conclusions was erroneous. We agree with the district court that the use of improper interview techniques in questioning the children did not violate any of Michaels's constitutional

rights. We conclude that the district court correctly determined that Michaels failed to demonstrate that her constitutional rights were violated. We do not consider its alternative grounds for granting summary judgment.

I

A child who attended the Wee Care Nursery School in Maplewood, New Jersey, reported to a nurse at his pediatrician's office that he had been sexually abused by Michaels. Michaels was employed at the nursery school as a teacher. On April 30, 1985, Louis Fonnelaras, an investigator with the Institutional Abuse Investigation Unit of the Division of Youth and Family Services, was assigned to investigate the merits of the child's allegation. Mr. Fonnelaras informed John Mastroangelo, an investigator with the Essex County Prosecutor's Office, of the child's accusation. Mr. Mastroangelo notified Sarah Sencer-McArdle, the director of the Child Abuse Unit of the Prosecutor's Office, of the sexual abuse report. Shortly thereafter, four other children made similar allegations regarding Michaels's conduct. Ms. Sencer-McArdle interviewed each of the children. The evidence she discovered induced a grand jury to return an indictment against Michaels.

Following the return of the first indictment, other children reported additional allegations of sexual misconduct by Michaels at the nursery school. After interviewing the children, Ms. Sencer-McArdle presented the results of her investigation to a second grand jury. The Essex County Prosecutor's Office continued to receive reports of sexual misconduct committed against children

at the Wee Care Nursery School. Ms. Sencer-McArdle presented this evidence to a third grand jury after conducting additional interviews. During the course of these investigations, Mr. Mastroangelo and George McGrath, another investigator with the Essex County Prosecutor's Office, Susan Esquilin, a psychologist, and Mr. Fonnelaras also participated in questioning the children. A total of one hundred and sixty-three charges were filed against Michaels in three separate indictments.

On June 22, 1987, the trial regarding these charges was commenced in the Superior Court of New Jersey. On April 15, 1988, the jury convicted Michaels of 115 counts of aggravated assault, sexual assault, endangering the welfare of children, and terroristic threats. On March 26, 1993, the Appellate Division reversed the convictions and remanded for a new trial. The court questioned the reliability of the methods used to interview the children. The court held that, "courts must provide a remedy where the record demonstrates that an accuser's testimony is founded upon unreliable perceptions, or memory caused by improper investigative procedures if it results in a defendant's right to a fair trial being irretrievably lost. . . . [and that a] factual hearing would be required for this purpose." *See State v. Michaels*, 264 N.J. Super. 579, 631-32 (App. Div. 1993). The Supreme Court of New Jersey affirmed the reversal of the judgment of conviction. *See State v. Michaels*, 136 N.J. 299 (1994). On December 1, 1994, the Essex County Prosecutor's Office dismissed all charges against Michaels.

On June 13, 1996, Michaels filed a complaint in the Superior Court of New Jersey. On July 25, 1996, the

defendants removed the action to the United States District Court, District of New Jersey. Numerous claims and defendants were dismissed, either voluntarily or by court order, leaving only the claims of malicious prosecution and violation of § 1983 against five defendants: Louis Fonnelaras, John Mastroangelo, Sarah Sencer-McArdle, George McGrath, and Susan Esquilin (collectively "the defendants"). The defendants filed motions for summary judgment based on the defense of qualified immunity. In May, 26, 1999, the district court granted the motions and dismissed the § 1983 claims. The district court remanded the common law malicious prosecution claim to the Superior Court of New Jersey. Michaels timely filed this appeal. We have jurisdiction pursuant to 28 U.S.C. § 1291.

II

We review a district court's grant of a motion for summary judgment de novo. *See Bartnicki v. Vopper*, 200 F.3d 109, 114 (3d Cir. 1999). Summary judgment is appropriate where, viewing the record in the light most favorable to the non-moving party, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *See Jones v. School Dist. of Philadelphia*, 198 F.3d 403, 409 (3d Cir. 1999).

In analyzing whether a defendant is entitled to the dismissal of an action based on the defense of qualified immunity, we must first determine "whether the plaintiff's claims make out a violation of a constitutional right." *Assaf v. Fields*, 178 F.3d 170, 174 (3d Cir. 1999) (citing *Siegert v. Gilley*, 500 U.S. 226, 231 (1991)). If we conclude that the plaintiff has alleged a violation of a

constitutional right, we must then determine whether the defendant violated a clearly established right such that a reasonable official in the defendant's position would know that his conduct was unlawful. *See id.; see also Sharrar v. Felsing*, 128 F.3d 810, 826 (3d Cir. 1997) ("Government officials performing discretionary functions are 'shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.' ") (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). These inquiries are questions of law that the court must resolve. *See Sharrar*, 128 F.3d at 828.

Michaels contends that the district court erred in concluding that the defendants were entitled to qualified immunity because the interview techniques they employed did not violate her constitutional right to due process under the Fourteenth Amendment. Michaels argues that the rationale of the district court, adopted from the Seventh Circuit's holding in *Buckley v. Fitzsimmons*, 20 F.3d 789 (7th Cir. 1994), is flawed because it "leaves a Section 1983 Plaintiff, such as Michaels, without recourse."

In *Buckley*, the plaintiff brought § 1983 claims against police officers for allegedly coercing witnesses, and paying them money to make false statements against him, in order to implicate him in the crime for which he was tried. *Id.* at 794. The court held in *Buckley* that "[c]oercing witnesses to speak . . . is a genuine constitutional wrong" that violates "the right of the person being interrogated to be free from coercion." *Id.* The court further held, however, that the plaintiff could not "complain that the prosecutors may have twisted [the witness's] arm"

because "[r]ights personal to their holders may not be enforced by third parties." *Id.* at 794-95 (citations omitted). The court in *Buckley* ruled that "using one person's coerced confession at another's trial violates his rights under the due process clause," but that "[p]rosecutors are entitled to absolute immunity for actions as advocates before the grand jury and at trial even if they present unreliable or wholly fictitious proofs." *Id.* at 795; *see also Imbler v. Pachtman*, 424 U.S. 409, 431 (1976) (holding that a prosecutor is entitled to absolute immunity from a civil suit for damages under § 1983 in initiating a prosecution and in presenting the state's case, including deciding which evidence to present).

Consistent with the analysis of the Seventh Circuit in *Buckley*, the district court in this matter held that the techniques used to interview the children during the course of the investigation did not violate Michaels's constitutional rights. The district court decided that Ms. Sencer-McArdle was entitled to absolute immunity in offering the unreliable evidence.

Michaels is correct in noting that such a rule leaves a plaintiff like herself without recourse. Indeed, the court in *Buckley* recognized this dilemma. 20 F.3d at 795 ("[T]he only way Buckley can establish a violation of the Constitution is to plead himself out of court."). The United States Supreme Court, in upholding absolute prosecutorial immunity, also noted that absolute prosecutorial immunity may "leave the genuinely wronged defendant without civil redress," but concluded that the policies served by granting absolute prosecutorial immunity outweighed any gap in a plaintiff's recovery. *See Imbler*, 424 U.S. at 427. This court has acknowledged that a person

harmed by the actions of a prosecutor would not be without any redress, because "[h]arm to a falsely-charged defendant is remedied by safeguards built into the judicial system – probable cause hearings, dismissal of the charges – and into the state codes of professional responsibility." *Kulwicki v. Dawson*, 969 F.2d 1454, 1464 (3d Cir. 1992).

Michaels suggests that a but for causation analysis would be more appropriate to resolving the issue of qualified immunity in this instance. To support this proposition, Michaels cites to the dissenting opinion in *Buckley*. The dissent in *Buckley* suggested that prosecutors are not immune from liability for their non-advocacy wrongful conduct if the plaintiff can demonstrate that the indictment and trial would not have occurred but for the wrongful conduct. 20 F.3d at 800 (Fairchild, J., dissenting). Judge Fairchild reasoned that the investigation techniques employed by the officers in *Buckley* were the same as manufacturing evidence and suborning perjury, actions that would be non-advocacy wrongful conduct. *See id.*

We are persuaded by the reasoning set forth in the majority opinion of *Buckley*. While we recognize that this rule may seem harsh to plaintiffs, we are satisfied that the remedies set forth in *Kulwicki* for a falsely-charged defendant are sufficient to discourage prosecutors from coercing witnesses to make unreliable statements against a defendant. Here, for example, Michaels's conviction was reversed and the serious charges against her were dismissed because the children's testimony was unreliable.

Michaels also attempts to support her argument that her constitutional rights were violated by the improper techniques used to interview the children by relying on the decision in *Clanton v. Cooper*, 129 F.3d 1147 (10th Cir. 1997). Michaels asserts that the court in *Clanton* held that the plaintiff had standing to assert a constitutional violation of his rights based upon a witness's coerced confession. Citing *Buckley*, the court in *Clanton* held that "a person may challenge the government's **use against him or her** of a coerced confession given by another person." *Id.* at 1157-58 (emphasis added). It recognized a plaintiff's constitutional right not to have another person's coerced statement used against him in an affidavit for an arrest warrant. *See id.*

The distinction between *Buckley* and *Clanton* is the use of the improperly obtained statements. In *Buckley*, the witness's coerced testimony was presented at trial. The court held that the prosecutor was absolutely immune from an action for damages under § 1983 under Imbler. *See* 20 F.3d at 795. In *Clanton*, on the other hand, the police used another person's coerced confession in an affidavit to obtain an arrest warrant for *Clanton*. 129 F.3d at 1151. In using a coerced statement in this manner, the court held in *Clanton* that the officers were not entitled to qualified immunity. *See id.* at 1159; *see also Malley v. Briggs*, 475 U.S. 335, 343 (1986) (holding that an officer applying for a warrant without probable cause may be entitled to qualified immunity but is not entitled to absolute immunity). Here, the only use of the improperly obtained statements against Michaels was the presentation of the children's testimony before the grand jury and at the criminal trial. Until the children testified against

her, Michaels's constitutional right to due process was not violated by the techniques used to interview the children.

The district court did not err in concluding that Michaels did not demonstrate a violation of her constitutional rights when the defendants employed improper interview techniques with the children. Thus, all of the defendants are entitled to qualified immunity for those acts. Furthermore, Ms. Sencer-McArdle is entitled to absolute immunity for offering the testimony of the children against Michaels before the grand jury in that trial.

III

Michaels also contends that she was denied the opportunity to discover evidence as to the proper interview techniques for interviewing children regarding allegations of sexual abuse in order to demonstrate that the defendants violated her clearly established constitutional rights. Because we conclude that the *questioning* of the children did not violate *Michaels's* constitutional rights, we need not consider this question. Furthermore, Michaels's final contention, that the district court erred in dismissing her malicious prosecution § 1983 claim for failure to state a claim, is also unavailing. The district court properly dismissed her claims on the basis that the remaining defendants were entitled to immunity. Any discussion in the district court's order as to whether Michaels stated a § 1983 malicious prosecution claim was superfluous. The order granting summary judgment can be upheld without reaching the court's alternative basis for dismissing the action.

IV

The defendants are entitled to qualified immunity for their acts in interviewing the children because Michaels did not demonstrate a violation of her own constitutional rights. Ms. Sencer-McArdle is entitled to absolute immunity for presenting the children's testimony against Michaels before the grand jury and at trial. We therefore AFFIRM the order granting the defendants' motion for summary judgment and dismissing Michaels's federal claims.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 99-5486

MARGARET KELLY MICHAELS

Appellant

v.

STATE OF NEW JERSEY; ATTORNEY GENERAL'S OFFICE; COUNTY OF ESSEX; ESSEX COUNTY PROSECUTOR; GEORGE L. SCHNEIDER, ESQ.; HERBERT TATE, ESQ.; JOHN MASTROANGELO; JOHN NOONAN; GLENN GOLDBERG, ESQ.; SARAH SPENCER-MCARDLE; EILEEN C. TREACY, M.A.; THE ESSEX COUNTY POLICE DEPARTMENT; NEWARK POLICE DEPARTMENT; DIVISION OF YOUTH AND FAMILY SERVICES; LOUIS FONNELARAS; SUSAN ESQUILLAN; "JOHN DOES", 1 THROUGH 20 (FICTITIOUS PERSONS); "JOSEPH DOES", 1 THROUGH 20 (FICTITIOUS PERSONS); "JAMES DOES"; "JANE DOES", 1 THROUGH 20 (FICTITIOUS PERSONS); "HARRY DOES", 1 THROUGH 20 (FICTITIOUS PERSONS); GEORGE MCGRATH

SUSAN ESQUILLAN

Defendant/Third-Party Plaintiff

v.

THE HEALTH CARE INSURANCE COMPANY

Third-Party Defendant

On Appeal from the United States District Court
for the District of New Jersey
(D.C. Civ. No. 96-03557)
District Judge: Honorable Maryanne Trump Barry

Present: Mansmann and Greenberg, *Circuit Judges*, and Alarcon, *Senior Circuit Judge**

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel on March 21, 2000.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court entered May 26, 1999, be, and the same is hereby affirmed. Costs taxed against appellant. All of the above in accordance with the opinion of this Court.

ATTEST:

/s/ Marced M. Waldron
Acting Clerk

Dated: June 5, 2000

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* The Honorable Arthur L. Alarcon, Senior Circuit Judge for the United States Court of Appeals for the Ninth Circuit, sitting by designation.

Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

No. ___

In The

Supreme Court of the United States

MARGARET KELLY MICHAELS,

Petitioner,

v.

GEORGE McGRATH, RICHARD MASTROANGELO, SARA SENCER-McARDLE, LOUIS FONNELLARAS, AND SUSAN ESQUILIN,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

SUPPLEMENTAL APPENDIX

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37pp

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

MARGARET KELLY MICHAELS, Plaintiff, v. STATE OF NEW JERSEY, ATTORNEY GENERAL'S OFFICE, COUNTY OF ESSEX, ESSEX COUNTY PROSECUTOR'S OFFICE, GEORGE L. SCHNEIDER, ESQ., HERBERT TATE, ESQ., JOHN MASTROANGELO, JOHN NOONAN, GLENN GOLDBERG, ESQ., SARAH SPENCER-McARDLE, EILEEN C. TREACY, M.A., ESSEX COUNTY POLICE DEPARTMENT, NEWARK POLICE DEPARTMENT, DIVISION OF YOUTH AND FAMILY SERVICES, LOUIS FONNELARAS, SUSAN ESQUILLAN, [ ], Defendants,	Civil Action No. 96-3557 (MTB) **ORDER** (Filed May 26, 1999)

This matter having come before the court upon the motion for summary judgment on behalf of defendants,

Sara Sencer-McArdle (improperly pled as "Sara Spencer-McArdle"), Essex County investigators George McGrath and Richard Mastroangelo, Division of Youth and Family Services investigator Louis Fonolleras, and psychologist Susan Esquilin (improperly pled as "Susan Esquillan"); and the court having reviewed the submissions of the parties without oral argument pursuant to Fed. R. Civ. P. 78;

IT IS on this 26th day of May, 1999, hereby

ORDERED that defendants' motions for summary judgment as to Count Four are granted; and it is further

ORDERED that Count One be and hereby is remanded to Superior Court, Law Division, Essex County; and it is further

ORDERED that defendant/third party plaintiff Esquilin's claim against defendant Health Care Insurance Company for costs incurred in defending this litigation is remanded to Superior Court, Law Division, Essex County.

/s/ Maryanne Trump Barry
MARYANNE TRUMP BARRY
U.S.D.J.

Margaret Kelly MICHAELS, Plaintiff,

v.

State of NEW JERSEY, Attorney General's Office, County of Essex, Essex County Prosecutor's Office, George L. Schneider, Esq., Herbert Tate, Esq., John Mastroangelo, John Noonan, Glenn Goldberg, Esq., Sarah Spencer-McArdle, Eileen C. Treacy, M.A., Essex County Police Department, Newark Police Department, Division of Youth and Family Services, Louis Fonnelaras, Susan Esquillan, [ ], Defendants.

No. Civ.A. 96-3557(MTB).

United States District Court,
D. New Jersey.

May 26, 1999.

Louis J. Santore, Santore & Kenny, Secaucus, New Jersey, for plaintiff.

Paul E. Stevenson, Deputy Atty. Gen., Division of Law, Newark, New Jersey, for defendants State of New Jersey; Attorney General's Office; Division of Youth and Family Services; and Louis Fonnelaras.

Michael R. Griffinger, Gibbons, Del Deo, Dolan, Griffinger & Vecchione, Newark, New Jersey, for defendant County of Essex.

David N. Samson, and Gage Andretta, Wolff & Samson, Roseland, New Jersey, for defendants Essex County Prosecutor; George L. Schneider, Herbert Tate, Glenn Goldberg, and Sarah Sencer-McArdle.

Steven C. Mannion, Asst. County Counsel, Catherine E. Tamasik, Essex County Counsel Hall of Records, Newark, New Jersey, for defendants Herbert Tate, George L. Schneider, Richard Mastroangelo; Glenn Goldberg, Sarah Sencer-McArdle.

Jacqueline A. DeGregorio Deputy Attorney General, Weiner Lesniak, Lincoln Centre, Parsippany, New Jersey, Defendants Glenn Goldberg, Sarah Spencer-McArdle.

John R. Gonzo, Harwood Lloyd, Hackensack, New Jersey, for defendant Eileen C. Treacy.

Steven C. Mannion, Asst. Corp. Counsel, Michelle Hollar-Gregory, Corporation Counsel, Newark, New Jersey, for defendant Newark Police Department.

Philip L. Geibel, Stevens & Minter, Secaucus, New Jersey, for defendant Susan Esquillan.

OPINION

BARRY, District Judge.

Assistant prosecutor Sara Sencer-McArdle (improperly pled as "Sara Spencer-McArdle") ("Sencer-McArdle"), Essex County Prosecutor's Office ("ECPO") investigators George McGrath ("McGrath") and Richard Mastroangelo ("Mastroangelo") (collectively the "county investigators"), and Division of Youth and Family Services investigator Louis Fonolleras ("Fonolleras"), all move for summary judgment on the complaint of plaintiff Margaret Kelly Michaels ("Michaels") on the ground of absolute or qualified immunity. Defendant and third party plaintiff psychologist Susan Esquilin (improperly pled as "Susan Esquillan") ("Esquilin"), also moves to

dismiss Michaels' complaint for failure to state a claim.[1] The court has reviewed the submissions of the parties without oral argument pursuant to Fed.R.Civ.P. 78. For the reasons discussed below, each of the defendants' motions will be granted.

I.

The facts of this case are, by now, well known. Michaels, after being convicted of numerous counts of child sexual abuse, spent five years in prison before being released when the Appellate Division reversed her conviction and remanded for a retrial. The Supreme Court affirmed, but the charges against Michaels were subsequently dismissed. She comes before this court seeking damages for being subjected to an allegedly unconstitutional investigation at the hands of defendants. This court will not attempt to recap every nuance of the case's history, and that history is well documented in the various opinions which have preceded this opinion.[2] Only what is relevant to the pending motions will be restated.

On April 26, 1985, upon being examined by his pediatrician, one of the children (M.P.) for whom Michaels

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[1] Third party defendant Health Care Insurance Company ("HCIC") moves to dismiss Esquilin's claim against it for indemnification, should Esquilin prevail on her motion to dismiss. *See* HCIC Letter, September 9, 1998. Esquilin opposes this request. *See* Esquilin Letter, September 17, 1998.

[2] *See e.g., State v. Michaels*, 136 N.J. 299, 642 A.2d 1372 (1994); *State v. Michaels*, 264 N.J.Super. 579, 625 A.2d 489 (App.Div.1993).

cared at the Wee Care Nursery in Maplewood, New Jersey, made an allegation of sexual abuse against her. Four days later, that allegation was referred to the Institutional Abuse Investigation Unit of the Division of Youth and Family Services ("DYFS"). Schiripo Cert., Exh. A, Fonolleras Dep. I at 71. Fonolleras, the investigator assigned to the DYFS investigation, contacted ECPO investigator Mastrangelo on May 1, 1985, as required by law, and Mastrangelo brought the matter to the attention of Sencer-McArdle, the director of the Child Abuse Unit of the ECPO. Sencer-McArdle Cert. 5.

Within a few days, four more children (E.N., S.R., C.C. and M.R.) came forward with allegations of abuse at the hands of Michaels. *Id.* 6. Sencer-McArdle interviewed all five children, in early May, after each child was initially interviewed by a county investigator. *Id.* 6-8. Esquilin, after being contacted by either the ECPO or DYFS by virtue of her position at United Hospital, conducted one interview and attended another. Esquilin Dep. at 61-63. Fonolleras and others conducted several more interviews of the children. Fonolleras Dep. at 87. On May 6, 1985, Michaels took a polygraph examination, the results of which were inconclusive.

Sencer-McArdle convened a grand jury on May 24, 1985 based on the allegations of three of the five children she interviewed (M.P., S.R. and C.C.). *Sencer-McArdle* Cert. 9. On June 6, 1985, the first of three indictments against Michaels was returned. *Id.* ¶ 8. Michaels was arrested at her East Orange apartment on June 12, 1985. Mannion Cert., Exh. A, McGrath Dep. II at 87.

Subsequent to the first indictment, the county investigators were notified by DYFS that there were other children claiming to have been sexually abused by Michaels. Sencer-McArdle Cert. 10. Interviews of these children by the county investigators followed, but Sencer-McArdle did not participate. *Id.* Instead, Sencer-McArdle interviewed parents and teachers, reviewed transcripts the county investigators had made of their interviews with the children (*id.*), and advised the investigators as to how to handle the interviews. Santore Cert., Exh. H, Noonan Dep. at 29-31. When Sencer-McArdle thereafter decided to present the newly gathered information to a second grand jury, she interviewed the latest group of children. A one hundred and seventy four count indictment involving approximately twenty children was returned by the second grand jury on July 30, 1985. Sencer-McArdle Cert. 11.

After the second indictment was returned, the ECPO was contacted regarding additional allegations of abuse of yet other children, and those children were interviewed by the investigators. *Id.* After those initial interviews, Sencer-McArdle interviewed the children in preparation for a third grand jury, which returned the final fifty-five count indictment against Michaels on November 21, 1985. *Id.*

Trial against Michaels commenced on June 22, 1987 in the Superior Court of New Jersey on the one hundred and sixty-three counts returned by the three grand

juries.[3] Assistant prosecutors Sencer-McArdle and Glenn Goldberg led the prosecution. Esquilin and Fonolleras both testified for the prosecution at the trial.

In April of 1988, Michaels was convicted of 115 counts of aggravated sexual assault, sexual assault, endangering the welfare of children, and terroristic threats. *See Michaels*, 136 N.J. at 305-06, 642 A.2d 1372. The Appellate Division reversed the convictions on March 26, 1993, and remanded for a new trial. *See Michaels*, 264 N.J.Super. at 629-32, 625 A.2d 489. The Appellate Division directed that a pretrial hearing would be required to ascertain the reliability of the children's statements and testimony should the prosecution decide to retry the case (*id.* at 631-32, 625 A.2d 489), and the Supreme Court of New Jersey agreed. *See Michaels*, 136 N.J. at 324, 642 A.2d 1372 (agreeing with the Appellate Division on the need for a taint hearing, stating that "the interrogations . . . were improper and there is a substantial likelihood that the evidence derived from them is unreliable"). On December 1, 1994, the ECPO formally dismissed all criminal charges against Michaels. Compl., First Count, 25.

On June 13, 1996, Michaels filed a six-count complaint against a multitude of defendants in the Superior Court of New Jersey, Law Division, Essex County. Defendants removed the case to this court on July 25, 1996. All that remains of the complaint, however, are Michaels' malicious prosecution and Section 1983 claims against Sencer-McArdle, McGrath, Mastrangelo, Fonolleras and

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[3] Seventy-two of the original counts were dismissed by the ECPO.

Esquilin.[4] Discovery on the issue of immunity having concluded, these defendants now move for dismissal of the claims against them.

II.

A. Summary Judgment Standard

Summary judgment may be granted when "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). When ruling on a motion for summary judgment, all facts and reasonable inferences drawn from the evidence are viewed in the light most favorable to the non-moving party. *See Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106

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[4] In her complaint and amended complaint, Michaels asserted claims for malicious prosecution (Count One), intentional infliction of emotional distress (Count Two), negligent training and supervision (Count Three), violation of 42 U.S.C. § 1983 (Count Four), abuse of process (Count Five), and negligent and malicious prosecutorial misconduct (Count Six). On November 8, 1996, this court dismissed the Second, Third, Fifth, and Sixth Counts of Michaels' complaint on the ground that the statute of limitations had run and because there had been noncompliance with the limitations and notice provisions of the New Jersey Tort Claims Act, *see Michaels v. State of N.J.*, 955 F.Supp. 315 (D.N.J.1996), leaving only her common law malicious prosecution and Section 1983 claims and the County's crossclaims. On June 30, 1997, this court dismissed Michaels' claims against the County of Essex. By stipulation, the complaint was dismissed against the State of New Jersey, the New Jersey Attorney General's Office and DYFS. Subsequently, stipulations of the dismissal of claims against Eileen C. Treacy, Glenn D. Goldberg, George Schneider and John Noonan were filed.

S.Ct. 1348, 89 L.Ed.2d 538 (1986). The moving party has the initial burden of pointing out the absence of a genuine issue as to any material fact, but summary judgment is only granted against a party who fails to demonstrate "the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

B. Michaels' Claim under 42 U.S.C. § 1983

In support of her claim pursuant to 42 U.S.C. § 1983, Michaels alleges that each defendant violated her Fourteenth Amendment rights in conducting the investigation.[5] Specifically, Michaels contends that the defendants: one, improperly suggested false allegations to the children and thereby destroyed their capacity to remember or recall; two, brainwashed the children with the aforementioned false suggestions; three, distorted the children's memories with suggestive and leading questions; four, used selective reinforcement via threats, coercion and bribes; five, failed to record interviews with the children and destroyed or intentionally lost tapes of interviews; and six, used gross and egregious interrogation techniques which included threatening and suggestive methods, in addition to coaching the children as to their

[5] The failure to train and supervise aspect of Michaels' § 1983 claim is no longer before the court as the defendants who would arguably be implicated in that conduct have already been dismissed.

interviews prior to taping. Amended Compl., ¶ 27(a)-(f).[6]

A Section 1983 claim must be based on an alleged constitutional, or federal statutory, violation.[7] If a defendant enjoys either absolute or qualified immunity, however, the action should be dismissed at the outset. Immunity is not simply a means of avoiding trial but, rather, a method of preventing a party from having to be subjected to litigation at all. *See Orsatti v. New Jersey State Police*, 71 F.3d 480, 483 (3d Cir.1995). If at all possible, therefrom, immunity issues should be resolved by the court at an early stage, as a matter of law. *See Hunter v. Bryant*, 502 U.S. 224, 228, 112 S.Ct. 534, 116 L.Ed.2d 589 (1991).

1. Absolute Immunity

Absolute immunity exists for those officers who perform judicial or quasi-judicial functions. *See Imbler v. Pachtman*, 424 U.S. 409, 420, 96 S.Ct. 984, 47 L.Ed.2d 128 (1976). Prosecutors are absolutely immune from liability

[6] For clarity, the court will reference these allegations under the umbrella of "improper interrogation techniques."

[7] Section 1983 provides, in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

42 U.S.C. § 1983.

under § 1983 for their conduct in "initiating a prosecution and presenting the State's case" insofar as that conduct is "intimately associated with the judicial phase of the criminal process." *See id.* at 430-431, 96 S.Ct. 984. Other officers, such as investigators, enjoy qualified immunity for their discretionary functions. *See Malley v. Briggs*, 475 U.S. 335, 340, 106 S.Ct. 1092, 89 L.Ed.2d 271 (1986). Whether an actor enjoys absolute or qualified immunity is based on the function he or she performs, not the title he or she holds. *See Jean v. Collins*, 155 F.3d 701, 707 (4th Cir.1998) ("[I]mmunity is tied to the nature of the function performed and not to the identity of the defendant performing that function [ ]"), cert. petition filed, 67 USLW 3409 (Dec. 16, 1998). In this case, the only remaining defendant eligible for absolute immunity is assistant prosecutor Sencer-McArdle, as none of the others performed any judicial or quasi-judicial functions.

A prosecutor generally enjoys absolute immunity for his or her quasi-judicial functions, or, to put it another way, when he or she is acting as an advocate for the state. Examples of such functions include: deciding whether or not to seek an indictment based on evidence gathered by law enforcement officers, *see Buckley v. Fitzsimmons*, 509 U.S. 259, 113 S.Ct. 2606, 125 L.Ed.2d 209 (1993); preparing for grand jury or trial proceedings, *see Imbler v. Pachtman*, 424 U.S. 409, 96 S.Ct. 984, 47 L.Ed.2d 128 (1976); and presenting evidence at a probable cause hearing. *See Burns v. Reed*, 500 U.S. 478, 111 S.Ct. 1934, 114 L.Ed.2d 547 (1991). A prosecutor does not enjoy absolute immunity, however, for functions deemed investigative in nature, such as the rendering of legal advice to the police or the fabrication of evidence during the investigative stage of a

case. *See id.* at 496, 111 S.Ct. 1934; *Buckley*, 509 U.S. at 274-76, 113 S.Ct. 2606.

Most of Sencer-McArdle's actions clearly fall within the ambit of quasi-judicial functions. When, for example, Sencer-McArdle decided to seek an indictment against Michaels, she was acting as an advocate for the state. *See Buckley*, 509 U.S. at 273, 113 S.Ct. 2606; *Kulwicki v. Dawson*, 969 F.2d 1454, 1463-64 (3d Cir.1992) ("The decision to initiate a prosecution is at the core of a prosecutor's judicial role. A prosecutor is absolutely immune when making this decision, even where he acts without a good faith belief that any wrongdoing has occurred.") (citations omitted). Furthermore, Sencer-McArdle enjoys absolute immunity for all of her activities in preparation for the grand jury proceedings and the actual trial, including witness preparation. This includes her decision to use and rely on Dr. Treacy, the expert witness, at trial. *See* Compl., Count Two, ¶ 28. It also encompasses her reliance on evidence subsequently deemed unreliable by the Supreme Court of New Jersey. *See Imbler*, 424 U.S. at 431, 96 S.Ct. 984 (holding that prosecutor enjoys absolute immunity "in initiating a prosecution and presenting the State's case" even if prosecutor knowingly submitted false evidence at trial).

Not all of Sencer-McArdle's actions, however, are so clearly quasi-judicial, and this court must look carefully to determine if and when she was acting in an investigative capacity, with only qualified immunity available for those activities. The line between quasi-judicial and investigative activities is concededly nebulous, and courts look to several factors. *See id.*, 424 U.S. at 431 n. 33, 96 S.Ct. 984; *Kulwicki*, 969 F.2d at 1465. One of the ways

by which to determine on which side of the line the actions in question fall is by determining when probable cause existed for, as the Supreme Court has held, prior to the establishment of probable cause to arrest, the prosecutor cannot be deemed an advocate for the state. *See Buckley*, 509 U.S. at 274, 113 S.Ct. 2606 ("A prosecutor neither is, nor should consider himself to be, an advocate before he has probable cause to have anyone arrested."). At issue here, therefore, are Sencer-McArdle's activities which predated her decision to seek an arrest and/or an indictment of Michaels, specifically: one, the interviews she conducted in early May of 1985 of the first five children; and, two, the legal advice she rendered to the investigators.

With respect to the interviews of the five children, Sencer-McArdle offers two conflicting conclusions as to whether probable cause then existed. In her certification to this court, Sencer-McArdle stated that those interviews were conducted to ascertain whether probable cause existed. *See* Sencer-McArdle Cert. 4, 6. However, one month later, on September 16, 1998, Sencer-McArdle stated, at her deposition, that probable cause already existed to arrest Michaels at the time of the interviews. *See* Sencer-McArdle Reply Brief, Exh. A, Sencer-McArdle Dep. at 32. Sencer-McArdle contends that she was always acting as an advocate. *See* Sencer-McArdle Cert. 12.

Although it is Sencer-McArdle's prerogative to attach whatever label she wishes to her conduct, it is this court's obligation to scrutinize that conduct to determine what

hat she wore during those early days of the investigation.[8] Interviews conducted to establish whether or not probable cause exists are investigative, rather than quasi-judicial, and that is what these early interviews appear to be. *See Buckley*, 509 U.S. at 273, 113 S.Ct. 2606 ("There is a difference between the advocate's role in evaluating evidence and interviewing witnesses as he prepares for trial, on the one hand, and the detective's role in searching for the clues and corroboration that might give him probable cause to recommend that a suspect be arrested, on the other hand.").

The time frame here belies Sencer-McArdle's assertion that these early interviews were not investigatory. As is discussed more fully above, Sencer-McArdle was made aware of the first allegation of abuse on May 1, 1985. She interviewed the first child within days and the next four children shortly thereafter. Michaels took a polygraph examination on May 6th. A grand jury was convened on May 24th and returned the indictment on June 6th. Michaels was arrested six days later.

It is highly unlikely that probable cause to arrest Michaels existed on the same day on which the ECPO was first made aware of the very first unsubstantiated allegation, or that Sencer-McArdle's interviews of the

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[8] While the immunity analysis on a motion for summary judgment does not vary significantly from the analysis of any other issue on summary judgment, the court is permitted to make a limited factual inquiry to resolve the defendant's role, if necessary. *See Forsyth v. Kleindienst*, 599 F.2d 1203, 1215 (3d Cir.1979), cert. denied, 453 U.S. 913, 101 S.Ct. 3147, 69 L.Ed.2d 997 (1981).

first five children almost immediately thereafter were in preparation for the grand jury presentation. *See* Sencer-McArdle Dep. at 17-18. Certainly, the inconclusive results of the polygraph from that same first week of May must have given Sencer-McArdle some pause. It is also unlikely in the extreme that the ECPO would have waited until June 12th to arrest Michaels if probable cause existed to arrest her on May 1st or thereabouts when at least arguably the safety of young children was at risk. *See Buckley*, 509 U.S. at 275, 113 S.Ct. 2606 (prosecutor's assertion that probable cause existed during allegedly investigatory phase was undermined by fact that suspect was arrested well after grand jury was impaneled).

Moreover, a prosecutor cannot, as Sencer-McArdle attempts to do here, invoke a later grand jury proceeding to retroactively recharacterize investigative activities as quasi-judicial. *See Buckley*, 509 U.S. at 276, 113 S.Ct. 2606 ("A prosecutor may not shield his investigative work with the aegis of absolute immunity merely because, after a suspect is eventually arrested, indicted, and tried, that work may be retrospectively described as 'preparation' for a possible trial; every prosecutor might then shield himself from liability for any constitutional wrong against innocent citizens by ensuring that they go to trial.").

Early in May, after being apprised of the first allegation against Michaels from DYFS, Sencer-McArdle was acting in an investigative capacity. No matter what label Sencer-McArdle puts on the five initial interviews (Sencer-McArdle Cert. ¶ 7), it is abundantly clear to this court that they were investigatory in nature. When a prosecutor functions as an investigator he or she only

enjoys the immunity of the investigator. *See Buckley*, 509 U.S. at 276, 113 S.Ct. 2606.

Sencer-McArdle also gave legal advice to the investigators on the Michaels' case. *See* Santore Cert., Exh. H, Noonan Dep. at 29-31. Under Burns, absolute immunity is unavailable to Sencer-McArdle for that activity. *See Burns*, 500 U.S. at 495, 111 S.Ct. 1934 (holding that it would be "incongruous to allow prosecutors to be absolutely immune from liability for giving advice to the police, but to allow police officers only qualified immunity for following the advice").

Thus, prior to the decision to seek an indictment, Sencer-McArdle was functioning as an investigator or engaging in investigative activities, conduct not protected by absolute immunity. *Cf. Hill v. City of New York*, 45 F.3d 653, 662-63 (2d Cir.1995) (stating that where prosecutor participated in videotaped interview of suspect, "if the videotapes were made to collect or corroborate evidence against Hill in order to get probable cause to arrest her, the act of making the tapes receives only qualified immunity"). Once Sencer-McArdle made the decision to seek an indictment and began to function as an advocate for the state by preparing for the grand jury and then for trial, however, she enjoys absolute immunity, and there can be no recovery by Michaels for those activities.

2. Qualified Immunity

Defendants[9] claim that Michaels cannot recover against them because they are immune from suit by virtue of the doctrine of qualified immunity. Michaels disagrees. Like absolute immunity, qualified immunity is a threshold issue that may be decided by the court at the outset of litigation. *See Orsatti*, 71 F.3d at 483 ("When the material facts are not in dispute, the district court may decide whether a government official is shielded by qualified immunity as a matter of law.") (citing to *Anderson v. Creighton*, 483 U.S. 635, 646 n. 6, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987)).

Qualified immunity is available to government officials, such as law enforcement officers, performing discretionary functions. *See Harlow v. Fitzgerald*, 457 U.S. 800, 816, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982). The immunity extends, moreover, to those who are working at the officers' behest, if the nature of the function performed is the same. *See Kerr v. Lyford*, 171 F.3d 330 (5th Cir.1999) (applying qualified immunity analysis to Department of Human Services case workers who participated in murder investigation). The actions of the five defendants before the court on these motions – the sole remaining defendants –

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[9] The remaining five defendants will be collectively referred to as "defendants" for purposes of the qualified immunity analysis. The court is aware that defendant Esquilin is moving to dismiss for failure to state a claim. Dispositive motions, however, were to be filed on the issue of immunity only. *See* Scheduling Order, December 8, 1997, ¶ 3. For that reason, and because Esquilin comes within the purview of qualified immunity, the court will assume that she has joined in the other defendants' motions.

that contributed to what Michaels claims to be the constitutional violation – improper interrogation techniques – will be analyzed, therefore, within the qualified immunity framework, as both Esquilin and Fonolleras appear to have been assisting the county investigators (McGrath and Mastrangelo) and Sencer-McArdle with the interviews.[10]

To be stripped of qualified immunity, and thus be subjected to potential liability pursuant to Section 1983, a defendant must have "violate[d] clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow*, 457 U.S. at 818, 102 S.Ct. 2727. Once a defendant raises the defense of qualified immunity, it is the plaintiff's burden to delineate the constitutional right that was violated and show that it was clearly established at the time of the conduct at issue. *See Morales v. Busbee*, 972 F.Supp. 254, 260 (D.N.J.1997), appeal dismissed, 156 F.3d 1225 (3d Cir.1998). Even if plaintiff satisfies that burden, however, it must be [sic] still be shown that an objective and reasonable officer – for the analysis does not concentrate on the subjective intent of the officer – would have acted otherwise. *See Orsatti*, 71 F.3d at 483 (noting that "the Supreme Court has recognized that it is inevitable that law enforcement officers will in some cases reasonably but mistakenly

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[10] As noted earlier, Esquilin was initially contacted through her employer, United Hospital, to conduct interviews. Fonolleras was, at the outset, heading the DYFS investigation which pertained to Wee Care's licensing, an investigation which was not criminal in nature. *See* Schiripo Cert., Exh. B, Fonolleras Dep. at 10, 31. Later, Fonolleras became directly involved in the ECPO's investigation. *See id.*, Exh A, Fonolleras Dep. at 100-01.

conclude that probable cause to make an arrest is present"). Finally, the court must assess the law and the officer's actions at the time the violation occurred. *See Hunter*, 502 U.S. at 228, 112 S.Ct. 534 ("[T]he court should ask whether the agents acted reasonably under settled law in the circumstances, not whether another reasonable, or more reasonable, interpretation of the events can be constructed five years after the fact.").

Before the court delves into the state of the law in 1985, it must first decide whether a constitutional violation has been alleged at all. *See Siegert v. Gilley*, 500 U.S. 226, 232, 111 S.Ct. 1789, 114 L.Ed.2d 277 (1991); *Miller v. City of Philadelphia*, 174 F.3d 368, 373 (3d Cir.1999) ("The proper approach, however, is to ascertain whether a constitutional violation has been alleged before determining if qualified immunity is available.").

Michaels claims that defendants violated her Fourteenth Amendment rights[11] by engaging in a "wholly improper investigation." Compl., Count Four, ¶¶ 6, 8.[12]

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[11] Michaels alleges that defendants deprived her of:

> the right of plaintiff not to be deprived of Life, Liberty, or Property without due process of Law, and the right to the equal protection of the laws, secured by the Fourteenth Amendment to the Constitution of the United States.

Compl., Count Four, ¶ 8.

[12] Specifically, Michaels alleges that: Defendants' acts were either for the intentional purpose of violating Plaintiff's rights, with a conscious disregard or a reckless disregard towards such rights, and were allegedly pursuant to governmental policies of the State and County regarding the handling of child abuse cases in a manner which disregarded the rights of the putative

No factual dispute exists over the type of interrogation and investigatory procedures employed by the defendants although defendants do not concede that those procedures were improper.[13] For purposes of a summary judgment motion, of course, this court must draw all inferences in favor of the non-movant. Thus, accepting Michaels' allegations as true, the inquiry becomes whether the improper interrogation techniques that were employed violated Michaels' constitutional rights.

An improper investigation yielding unreliable evidence has its own remedy in the criminal justice system: suppression of the evidence at trial or reversal of a conviction based on the unreliable evidence. *See Kulwicki*, 969 F.2d at 1464 ("Harm to a falsely-charged defendant is remedied by safeguards built into the judicial system – probable cause hearings, dismissal of the charges – and into the state codes of professional responsibility.") (citing *Burns*, 111 S.Ct. at 1939, 1942). Having failed to convince the trial judge that remedy was required because improper interrogation techniques which led to unreliable evidence had been used, Michaels utilized the appellate process. Slow as that process may have seemed to her, it was the appropriate method by which to challenge

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defendant and maximized public exposure and publicity, especially as those policies were applied to Plaintiff.

Compl., Count Four, ¶ 4.

[13] Both the Appellate Division and the Supreme Court of New Jersey detailed the factual aspects of the various interviews and techniques used. *See Michaels*, 264 N.J.Super. at 621, 625 A.2d 489; *Michaels*, 136 N.J. at 314-15, 642 A.2d 1372, Appendix. Because the facts are uncontested, this court will not delve into the specific question-and-answer sessions.

those techniques and that evidence. Whether the improper interrogations rose to the level of a constitutional violation is a very different matter, and this court finds that they did not.

The interrogation techniques, standing alone, could not have violated Michaels' constitutional rights, but only, perhaps, the rights of the child being interviewed. *See Buckley v. Fitzsimmons*, 20 F.3d 789, 794-95 (7th Cir.1994), cert. denied, 513 U.S. 1085, 115 S.Ct. 740, 130 L.Ed.2d 642 (1995). When the child's testimony was introduced at trial, however, Michaels' due process rights were implicated. *See id.* Michaels, of course, may not sue for a due process violation based on testimony introduced at trial because, as discussed above, absolute immunity shields that act. *See id.* at 795 ("Obtaining the [coerced] confession is not covered by immunity but does not violate any of [plaintiff's] rights; using the confession could violate [plaintiff's] rights but would be covered by absolute immunity.") (emphasis in original). *See also Buckley*, 20 F.3d at 796 ("A person aggrieved by proposed [ ] testimony may ask the judge to exclude it, and may appeal from an adverse judgment, but may not collect damages from the lawyers who recruited the witness.").

Even assuming, however, that improper interrogation techniques, standing alone, could state a constitutional violation and further assuming that defendants violated a constitutional right of Michaels, it does not automatically follow that that right was clearly established at the time of the violation, or that the interrogation techniques at issue were unreasonable in light of what was then known.

Parenthetically, in a qualified immunity analysis, defining the constitutional right at issue is critical in assessing whether or not that right was clearly established. *See Anderson*, 483 U.S. at 639, 107 S.Ct. 3034 (noting that this part of the qualified immunity analysis "depends substantially upon the level of generality at which the relevant 'legal rule' is to be identified"). Indeed, qualified immunity would be a worthless defense if a plaintiff could simply invoke a broad constitutional right – as here, "due process" – that a defendant supposedly violated to overcome the hurdle. *See id.*; *Myers v. Morris*, 810 F.2d 1437, 1459 n. 16 (8th Cir.1987) ("Qualified immunity would be meaningless if it could be defeated merely by the recitation of some well-recognized right and a conclusory allegation that the defendant infringed it."), cert. denied, 484 U.S. 828, 108 S.Ct. 97, 98 L.Ed.2d 58 (1987).

Even though Michaels has stated the supposed constitutional right in the broadest possible fashion, a case startlingly similar to the case at hand puts meat on those bare bones. *See Myers*, 810 F.2d at 1437. In *Myers*, fifteen arrestees (including parents of the alleged victims) were charged with child sexual abuse. *See id.* at 1440-41. After the first two arrestees were tried and acquitted, all pending charges against the others were dismissed. *See id.* The arrestees subsequently filed Section 1983 actions contending that:

> [t]he prosecutor, sheriff's deputies, as well as guardians, therapists and a court-appointed attorney are alleged to have interrogated children for an improper purpose (conspiring to elicit fabricated accusations against the plaintiffs) and

> in an improper manner (using methods so flawed that they inevitably produced false and fabricated accusations).

Id. at 1444. An appeal was taken after the trial court denied certain summary judgment motions and granted others. The Court of Appeals for the Eighth Circuit held that all the defendants were entitled to qualified immunity.[14]

In its analysis of qualified immunity with respect to the deputy sheriffs' interrogation of the alleged child victims, the court stated:

> We examine the specific interrogation conduct identified in the record to determine whether it so exceeded accepted legal norms for the questioning of witnesses and victims that the interrogating detectives knew or should have known their conduct would violate the rights of accused persons. We do not think it sufficient for purposes of this inquiry to determine only whether fourth, fifth, sixth and fourteenth amendment rights were clearly established in 1984. Our inquiry is whether from a 1984 perspective the law was clearly established that the conduct in which the deputies engaged would violate such rights.

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[14] *Myers* was abrogated in part by *Burns*, in which the Supreme Court held that a prosecutor was not entitled to absolute immunity for rendering legal advice to police officers. *See Burns v. Reed*, 500 U.S. 478, 111 S.Ct. 1934, 114 L.Ed.2d 547 (1991). With respect to the qualified immunity analysis, however, the section of the opinion relevant here, *Myers* remains good law.

Myers, 810 F.2d at 1458-59 (emphasis added). This court agrees and will engage in the same form of analysis, i.e. in 1985, did defendants' interrogation techniques violate "constitutional standards protecting accused persons from suggestive or coercive interrogation of witnesses and victims." *Id.* at 1459.

In the mid 1980s, child abuse prosecutions had risen dramatically yet little was known about procedures regarding interviews of alleged victims. *See* John E.B. Myers, *Taint Hearings for Child Witnesses? A Step in the Wrong Direction*, 46 BAYLOR L.REV. 873, 878 (1994). The ECPO did not have a manual or set of instructions as to how to adequately interview children. *See* Def. Sencer-McArdle Reply Br., Exh. F, Laurino Cert. 2; Exh. E, Sencer-McArdle Supp.Cert. 3. The defendants in the Myers prosecution, which took place shortly before the Michaels prosecution, acted in a similar fashion to the defendants here when interviewing the child abuse victims. After recognizing and discussing the fact that the "unique reluctance" of victims of child sexual abuse to acknowledge that sexual abuse has occurred is at least in part responsible for the uncertainty surrounding acceptable investigative techniques, the *Myers* court concluded, in 1987, as follows:

> We conclude that the interviewing conduct occurred in a grey area of investigative procedure as to which there were, and probably still are, less than clearly established legal norms. The grey area referred to involves the extent to which juvenile suspected sexual abuse victims may reasonably be questioned, particularly if they initially deny abuse, and the extent to which leading questions, confrontation

> with reports by others and photographs of suspects may be used. . . . We do not consider the standards for the interrogation of juvenile witnesses and victims, particularly in the area of sexual abuse, so clearly established in 1984 that on the basis of hindsight the deputies should now be forced to defend their questioning techniques in these damages suits.

Myers, 810 F.2d at 1461. This court agrees.

Unfortunately for Michaels herself, the Michaels case inspired a change in the law. *See Karol L. Ross, State v. Michaels*: A New Jersey Supreme Court Ruling With National Implications, 78 MICH.B.J. 32, 32 (1999) ("Michaels is one of the first cases that attempts to resolve the issue of the reliability of testimony of the alleged child abuse victim, thus filling an important void.") (emphasis added). Indeed, the Supreme Court of New Jersey, in affirming the reversal and requirement for a taint hearing six years after the conviction, noted that:

> Our decision today should make clear that the investigatory techniques employed by the prosecution in this case are unacceptable and that prudent prosecutors and investigatory agencies will modify their investigatory practices to avoid those kinds of errors and to conform to those standards that are now accepted by the professional and law enforcement communities.

Michaels, 136 N.J. at 323, 642 A.2d 1372 (emphasis added).

Defendants are not required to predict what tenets will emerge in the area of interviewing alleged child sexual abuse victims. *See Myers*, 810 F.2d at 1460 (noting that "a reasonable person is not expected to act as a legal

scholar and predict the future direction of the law") (citation omitted). Nor are they required to pay for their mistakes that predated and, indeed, inspired, a change in the law.

As the Supreme Court of New Jersey found, the investigation was clearly "inept." This court, too, is dismayed at how the investigation and questioning were handled. For starters, the children were interviewed numerous times, even after initially denying that abuse occurred; the investigators used suggestive and leading questions; and the children were rewarded for "correct" answers.

Michaels contends that the Supreme Court of New Jersey's finding that the investigation was inept is the same as finding that defendants were "plainly incompetent" and, thus, not entitled to qualified immunity. *See* Pl.Br. at 34; and *see Burns*, 500 U.S. at 494-95, 111 S.Ct. 1934 ("As the qualified immunity defense has evolved, it provides ample protection to all but the plainly incompetent or those who knowingly violate the law."). But there is an important distinction between what the Appellate Division and the Supreme Court of New Jersey did and said on the Michaels appeal and what Michaels asks this court to do today. Both of the New Jersey higher courts that dealt with the case were permitted to enjoy the benefit of hindsight; this court is not. Indeed, the information on which the Appellate Division and the New Jersey Supreme Court relied in 1993 and 1994, respectively, came from articles and journals published after Michaels was found guilty. *See Michaels*, 264 N.J.Super. at 622-29, 625 A.2d 489; *Michaels*, 136 N.J. at 307-12, 642

A.2d 1372. Those courts created new law; this court must apply old.

As the Fourth Circuit held, "[o]fficials are not liable for bad guesses in gray areas; they are liable for transgressing bright lines." *Maciariello v. Sumner*, 973 F.2d 295, 298 (4th Cir.1992), cert. denied sub. nom, 506 U.S. 1080, 113 S.Ct. 1048, 122 L.Ed.2d 356 (1993). The reasonableness of defendants' actions must be assessed, therefore, in light of the information they possessed at the time. Considering what little was known in the mid-1980's, this court cannot say that the defendants transgressed any "bright line [ ]."[15]

Thus, even assuming that improper interrogation techniques can be said to violate a constitutional right, and further assuming that defendants violated that right, Michaels has utterly failed to establish that the contours of that right were clearly established at the time of the violation, nor has she demonstrated that defendants acted unreasonably, in light of what limited knowledge they had.[16] Defendants' motions for summary judgment

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[15] One commentator stated:

> The trio of problems described above – overzealousness, inaccurate beliefs, and excessive use of leading questions – appear to have been particularly prevalent during the 1980s. . . . By the closing years of the decade, serious efforts were underway to improve the knowledge, skills, and objectivity of interviewers.

See Myers, 46 BAYLOR L.REV. at 883-84.

[16] To the extent that Michaels contends that Sencer-McArdle violated her rights by failing to give adequate advice to the investigators, this court finds that because of the uncertainty that surrounded these types of investigations in

on the ground of qualified immunity are, therefore, granted and Count Four will be dismissed.

One final comment. The issue of immunity aside, if this court were to construe Michaels' Section 1983 claim as grounded on the common law tort of malicious prosecution – which in light of her allegations is plausible – Count Four would be dismissed for failure to state a claim.

Prior to 1994, the Court of Appeals for the Third Circuit allowed a Section 1983 malicious prosecution claim to be pled in the most liberal manner in the country. *See Albright v. Oliver*, 510 U.S. 266, 270-71 n. 4, 114 S.Ct. 807, 127 L.Ed.2d 114 (1994) ("The most expansive approach is exemplified by the Third Circuit, which holds that the elements of a malicious prosecution action under [Section] 1983 are the same as the common-law tort of malicious prosecution.") (citing *Lee v. Mihalich*, 847 F.2d 66, 70 (1988)). To successfully state a claim, a plaintiff simply had to allege the elements of common law malicious prosecution. *See Lee*, 847 F.2d at 70.

The landscape changed, however, in 1994 with the Supreme Court's plurality in *Albright*. There, the Court struck a Section 1983 malicious prosecution claim that was based on a violation of the plaintiff's substantive due process rights, but left open the possibility that such a claim could be based on a violation of Fourth Amendment rights. *See Albright*, 510 U.S. at 271, 114 S.Ct. 807.

1985, Sencer-McArdle enjoys qualified immunity as to advice she did or did not give.

The Third Circuit first construed *Albright* to mean that such a claim must, therefore, include not simply the elements of common law malicious prosecution but some type of seizure under the Fourth Amendment, as well. *See Gallo v. City of Philadelphia*, 161 F.3d 217, 221-22 (3d Cir.1998). The *Gallo* court envisioned, in keeping with the Third Circuit's historically expansive view of a Section 1983 malicious prosecution claim, that a post-conviction incarceration, resulting from the alleged malicious prosecution, would satisfy *Albright's* Fourth Amendment requirement. *See id.* at 223-24

But *Gallo* was the first, not the last, word in this Circuit. Shortly after *Gallo*, the Third Circuit again interpreted *Albright*. *See Torres v. McLaughlin*, 163 F.3d 169 (3d Cir.1998). Agreeing that a Section 1983 malicious prosecution claim was foreclosed under the Fourteenth Amendment's substantive due process clause, the *Torres* court interpreted *Albright* in one sense more expansively than had the *Gallo* court, viewing *Albright* as leaving open the possibility that such a claim could be based on a constitutional amendment other than the Fourth Amendment. *See id.* at 172. However, the *Torres* court also read *Albright* more narrowly than had the *Gallo* court in holding that post-conviction incarceration could not satisfy the seizure requirement, as the Fourth Amendment protected only against pre-conviction, rather than post-conviction, detainment. *See id.* at 174.

One, and only one, clear principle emerges: a Section 1983 malicious prosecution claim cannot be based on a substantive due process violation alone. Thus, if Count Four is construed as a Section 1983 malicious prosecution

claim based on a violation of Michaels' substantive due process rights, it fails to state a claim.

III.

For the reasons discussed above, defendants' motions for summary judgment are granted. The court declines to exercise supplemental jurisdiction over the only remaining claim, the common law malicious prosecution claim contained in Count One.[17] Count One is, therefore, remanded to Superior Court, Law Division, Essex County. An appropriate order will issue.

ORDER

This matter having come before the court upon the motion for summary judgment on behalf of defendants, Sara Sencer-McArdle (improperly pled as "Sara Spencer-McArdle"), Essex County investigators George McGrath and Richard Mastroangelo, Division of Youth and Family Services investigator Louis Fonolleras, and psychologist Susan Esquilin (improperly pled as "Susan Esquillan"); and the court having reviewed the submissions of the

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[17] Plaintiff will not be unfairly prejudiced by this court's decision not to exercise supplemental jurisdiction over Count One because the parties have conducted only limited discovery thus far. *See Growth Horizons, Inc. v. Delaware County*, 983 F.2d 1277, 1284 (3d Cir.1993) (in determining whether to dismiss supplemental claims, court should take into account "judicial economy, convenience, and fairness to the litigants") (quoting *United Mine Workers v. Gibbs*, 383 U.S. 715, 726, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966)).

parties without oral argument pursuant to Fed.R.Civ.P. 78;

IT IS on this 26th day of May, 1999, hereby

ORDERED that defendants' motions for summary judgment as to Count Four are granted; and it is further

ORDERED that Count One be and hereby is remanded to Superior Court, Law Division, Essex County; and it is further

ORDERED that defendant/third party plaintiff Esquilin's claim against defendant Health Care Insurance Company for costs incurred in defending this litigation is remanded to Superior Court, Law Division, Essex County.

Supreme Court, U.S.
FILED
OCT 3 2000
CLERK

(3)

No. 00-361

In The

Supreme Court of the United States

MARGARET KELLY MICHAELS,

Petitioner,

v.

GEORGE McGRATH, RICHARD MASTROANGELO, SARA SENCER-McARDLE, LOUIS FONNELARAS, AND SUSAN ESQUILIN,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF IN OPPOSITION

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13 pp

CORPORATE DISCLOSURE STATEMENT

Pursuant to U.S. Sup. Ct. Rule 29.6, respondent, Susan Esquilin, Ph.D. (improperly pleaded as "Susan Esquillan") states that she is a private individual with no affiliation to a corporation, parent company, or subsidiary.

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RULE

U.S. Sup. Ct. Rule 10 1

STATUTE

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REASONS FOR DENYING THE WRIT

Petitioner seeks review on a writ of certiorari on the grounds that the majority and the dissent in *Buckley v. Fitzsimmons*, 20 F.3d 789 (7th Cir. 1994), *cert. den.*, 513 U.S. 1085 (1995) disagree. This is not a traditional ground upon which a writ of certiorari may issue. U.S. Sup. Ct. Rule 10. The rule which sets forth commonly recognized grounds upon which a petition for a writ of certiorari may be granted limits those grounds to a situation in which "[one] United States court of appeals has entered a decision in conflict with the decision of *another* United States court of appeals on the same important matter." U.S. Sup. Ct. Rule 10. Petitioner cites no case or rule in which this Court has granted a writ of certiorari solely on the grounds that the case at bar relied upon a case in which a dissent was filed. Nor should such a result be permitted. There is no error in one Circuit Court agreeing with the majority decision of a sister Circuit.

Petitioner alternately seeks review on a writ of certiorari on the grounds that the Seventh Circuit decision in *Buckley, supra* is contrary to the Tenth Circuit decision in *Clanton v. Cooper*, 129 F.3d 1147 (10th Cir. 1997). Respondent maintains that these decisions are not in conflict but are reconcilable.

Petitioner additionally and alternately argues that, in the case at bar, the Third Circuit relied on erroneous facts to distinguish the *Clanton* decision. This argument is based upon a misreading of the Third Circuit's decision. In fact, the alleged factual distinction upon which petitioner relies was not determinative of the Third Circuit's analysis of *Clanton*.

Finally, petitioner seeks review on a writ of certiorari on the grounds that the decision of the Third Circuit leaves an entire class of criminal defendants without redress. This is an issue which this Court has already addressed. In *Imbler v. Pachtman*, 424 U.S. 409, 427, 96 S.Ct. 984, 993 47 L.Ed.2d 128 (1976), this Court recognized that the balancing of competing rights and interests may, sometimes, "leave a genuinely wronged defendant without civil redress." Because criminal defendants have other means of redress, the absence of civil redress is not violative of any constitutional mandate.

I. There Is No Inconsistency Among the Circuits with Regard to the Use of Improperly Obtained Statements of Third Parties in Criminal Prosecutions.

The question of whether the improper interrogation of witnesses can be held to constitute a violation of the rights of the criminal suspect was addressed in *Buckley v. Fitzsimmons*, 20 F.3d 789 (7th Cir. 1994), *cert. den.*, 513 U.S. 1085 (1995). The *Buckley* Court held that the criminal suspect could not support a 42 U.S.C.A. § 1983 claim based upon an allegation of improper interrogation of witnesses because the constitutional violation, if any, was related to the rights of the witnesses, not the suspect.

> Coercing witnesses to speak, rather than loosening their tongues by promises of reward, is a genuine constitutional wrong, but the persons aggrieved would be [the witnesses] rather than [the suspect]. Overbearing tactics violate the right of the person being interrogated to be free from coercion.

Buckley, 20 F.3d at 794. Hence, even if the interrogation of the witnesses did exceed the bounds of propriety to the extent that a constitutional violation occurred, the party who suffered the wrong was the witness who had been subjected *to* the interrogation, not the party who was the subject *of* the interrogation.

If the fruits of the interrogation are used against the suspect either at trial or before the grand jury to obtain an indictment, all parties involved would be shielded by the absolute immunity from suit which attaches to the prosecutorial/advocacy aspect of their work as explained in *Imbler v. Pachtman*, 424 U.S. 409, 96 S.Ct. 984, 47 L.Ed.2d 128 (1976). However, if the fruits of the improper interrogation are not used, then there is no consequence to the suspect. Questions were asked about him but the answers were not used against him. The only injury which could possibly have occurred in the gathering of the information would have been to the witness who was interrogated. Therefore, unless and until the fruits of the interrogation are used in the prosecution of the suspect, his rights are not implicated. *See, Buckley*, 20 F.3d at 795.

Thus, while the witness might be able to sustain a § 1983 claim based upon the impropriety of the interrogation regardless of whether the fruits of the interrogation were presented in a prosecution, the suspect can never sustain a § 1983 claim based upon an improper interrogation of another person. "Rights personal to their holders may not be enforced by third parties." *Id.* The witnesses have the right to act to protect their own rights and seek remedial measures when those rights are violated. So, too, does the suspect have the right to protect her rights

and seek remedial measures when those rights are violated. However, the remedy is not always found in § 1983. The Third Circuit was persuaded by the Seventh Circuit's analysis and adopted the rule and rationale of the *Buckley* majority.

Petitioner seeks a different result by relying on the dissent in *Buckley*. However, the dissent relies upon a factual distinction which renders the reasoning inapplicable in the case at bar. The dissent in *Buckley* notes that "Buckley has alleged that the prosecutors fabricated evidence and induced perjured testimony which caused his imprisonment." *Buckley*, 20 F.3d at 801. The dissent defers to a liberal construction of the Complaint to reach the conclusion that the allegations must survive dismissal.

However, in the case at bar, while there are allegations of improper interrogation techniques,[1] nothing supports a conclusion that the evidence was deliberately fabricated or that perjury was suborned. The only allegation is that the techniques used resulted in evidence of dubious reliability. *State v. Michaels*, 136 N.J. 299, 324 (1994). The police were chided for "ineptness" but never accused of deliberate efforts to fabricate evidence or suborn perjury. *Michaels*, 136 N.J. at 313-14.

The Third Circuit reviewed, considered, and adopted the majority opinion in *Buckley*. Just as the petition for a writ of certiorari was denied in *Buckley*, so too, should it be denied in the case at bar. Petitioner's exhortation that

[1] Respondent Susan Esquilin, Ph.D. does not concede that her participation in the subject investigation was in any way or to any degree improper.

the *Buckley* dissent should be read to recognize a constitutional violation if petitioner can demonstrate that the indictment would not have occurred but for the wrongful conduct of the investigators fails to address the material factual distinction which formed the basis for Judge Fairchild's dissent. Because there is no evidence of suborned perjury in the case at bar, the present case is not an appropriate vehicle to raise the arguments of the *Buckley* dissent.

Petitioner also relies on *Clanton v. Cooper*, 129 F.3d 1147 (10th Cir. 1997), a case which cites the majority opinion in *Buckley* with favor. *Clanton*, 129 F.3d at 1157-58. Indeed, although the *Clanton* Court held that a suspect had standing to contest the voluntariness of a witness' confession and that the suspect could sustain a § 1983 claim based upon a coerced confession unless qualified immunity attached, *Clanton* does not contradict the holding in *Buckley*. Rather, the cases are factually distinguishable and therefore reconcilable.

Like the *Buckley* Court, the *Clanton* Court held that the suspect could not sustain a claim under § 1983 until the tainted evidence was used against him:

> Consequently, because the evidence is unreliable and its use offends the Constitution, a person may challenge the government's *use* against him or her of a coerced confession given by another person.

Clanton, 1129 F.3d at 1157-58 (emphasis added). The facts – not the law – distinguish *Clanton* from *Buckley*.

Indeed, *Buckley* explained in *dicta* that the suspect had standing to challenge the **use** of the allegedly tainted

evidence at trial or before the grand jury but for the fact that these uses were cloaked in absolute immunity. Hence, while the use was subject to challenge, no remedy under a § 1983 suit was available as the suit would be barred. *Buckley*, 20 F.3d at 795. Standing was recognized in *Clanton* because the *use* of the challenged evidence was not subject to absolute immunity.

In *Clanton*, the allegedly tainted evidence was used by a Fire Marshall Agent to obtain an arrest warrant. The warrant was quashed and no charges were ever filed against the suspect. *Clanton*, 129 F.3d at 1150. The United States Supreme Court has held that a police officer applying for an arrest warrant is not shielded by absolute immunity but only protected by qualified immunity. *Malley v. Briggs*, 475 U.S. 335, 343, 106 S.Ct. 1092, 1097, 89 L.Ed.2d 271 (1986). Hence, the § 1983 suit was not barred outright but subject to review under the standards of qualified immunity.

However, in the case at bar, the allegedly tainted evidence was used to obtain an indictment before a grand jury. *Michaels*, 136 N.J. at 305. Under *Buckley*, no claim for damages may be sustained under § 1983 based on this allegation because the evidence was used for a function from which all government actors are absolutely immune: presentation to a grand jury. *Imbler v. Pachtman*, 424 U.S. 409, 421-22, 96 S.Ct. 984, 991, 47 L.Ed.2d 128 (1976).

Petitioner's argument that the Third Circuit based its decision on erroneous facts is a misnomer. Petitioner argues that the Third Circuit erroneously found that the tainted statements were only used before the grand jury but that the Third Circuit should have found that the

statements were also used to fuel the investigation, an act which petitioner argues is not protected by immunity. No erroneous facts formed the basis of the Third Circuit's opinion.

This argument is based not upon a misunderstanding of facts but rather of Petitioner's disagreement with the Court's analysis of those facts. The decision of the Third Circuit fairly and fully explains the extent of the investigation and the evidence which led to the grand jury indictment. The Third Circuit correctly considered the facts and applied them in accordance with the law as set forth in *Buckley* and *Clanton*.

II. Adequate Remedies Exist for the Protection and Redress of Wrongly Prosecuted Defendants.

Petitioner argues that she was wrongly convicted of a crime and suffered damages as a result. This fact alone does not justify or support a claim under § 1983. *Thompson v. Prince William County*, 753 F.2d 363, 364-65 (4th Cir. 1985) cited with favor in *Schneider v. Simonini*, 314 N.J. Super. 583, 596 (App. Div. 1998). Indeed, while recognizing the salutary and necessary purposes served by prosecutorial immunity, our Supreme Court also recognized that the application of the immunity rule may "leave a genuinely wronged defendant without civil redress." *Imbler v. Pachtman*, 424 U.S. 409, 427, 96 S.Ct. 984, 993, 47 L.Ed.2d 128 (1976). Indeed, every form of legal immunity – charitable immunity, tort claims immunity, etc. – arguably leaves a wronged defendant without civil redress. Such is the nature of immunity.

However, a cognizable cause of action does not lie behind every alleged injury. Petitioner's remedy lies in the criminal justice system, not in a civil rights suit. "Harm to a falsely-charged defendant is remedied by safeguards built into the judicial system – probable cause hearings, dismissal of the charges – and into the state codes of responsibility." *Giuffre v. Bissell*, 31 F.3d 1241, 1252 (3rd Cir. 1994).

Petitioner's conviction was reversed on appeal. *State v. Michaels*, 264 N.J. Super. 579 (App. Div. 1993). The New Jersey Supreme Court affirmed that decision. *State v. Michaels*, 136 N.J. 299 (1994). She has benefited from the remedies available to her. The law provides no other remedy. Nor should it.

Civil immunity has costs. It is for our Courts and Legislatures to balance the competing interests and determine when that cost is worth the price. Our Courts have recognized that prosecutorial immunity is a necessity without which law enforcement could not properly function. Immunity exists to protect those who have in good faith made a questionable choice by giving "ample room for mistaken judgments" while still allowing them to do their job. *Malley v. Briggs*, 475 U.S. 335, 343, 106 S.Ct. 1092, 1097, 89 L.Ed.2d 271 (1986). Given the public policy reasons upon which qualified immunity is founded, the immunity is – and must be – paramount over claims for civil redress.

CONCLUSION

For all of the foregoing reasons, Respondent Susan Esquilin, Ph.D. (improperly pleaded as "Susan Esquillan") respectfully requests that this Honorable Court deny the Petition.

Respectfully submitted,

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Supreme Court, U.S.
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(4)

No. 00-361

IN THE

Supreme Court of the United States

MARGARET KELLY MICHAELS,
Petitioner,

v.

GEORGE MCGRATH, RICHARD MASTROANGELO, SARA SENCER-McARDLE, LOUIS FONNELARAS, AND SUSAN ESQUILIN,
Respondents.

On Petition for a Writ Of Certiorari to the United States Court of Appeals for the Third Circuit

Brief of the Respondent Louis Fonnelaras in Opposition to Petition for Writ Of Certiorari

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1990

QUESTION PRESENTED

Is a state Division of Youth and Family Services investigator entitled to qualified immunity from payment of damages under 42 U.S.C. §1983 for the manner in which he investigated reports that a day care worker had sexually abused children at the Wee Care Day Nursery in 1985?

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STATEMENT OF THE CASE

The District Court granted summary judgment to Louis Fonnelaras, an employee of the State of New Jersey's Division of Youth and Family Services ("DYFS"), and other defendants on the grounds of qualified and absolute immunity on May 26, 1999. (Supplemental Appendix), *Michaels v. State of New Jersey*, 50 F.Supp. 2d 353 (D.N.J. 1999). The Third Circuit affirmed on June 5, 2000. (Appendix),[1] *Michaels v. State of New Jersey*, 222 F. 3d 118 (3rd Cir. 2000). Michaels seeks review of these decisions in the Supreme Court.

Fonnelaras was one of the individuals who investigated reports to DYFS in 1985 that Michaels was sexually abusing children while she was employed at the Wee Care Day Nursery. DYFS has a statutory duty to "immediately take such action as shall be necessary to insure the safety of the child" when it receives a complaint of child abuse. *See*, N.J. Stat. Ann. §9:6-8.11. DYFS assigned Fonnelaras to investigate after it received the complaint about Michaels. As part of his assignment, he submitted a report to the DYFS Bureau of Licensing in December 1985. He also testified in criminal proceedings that the Essex County Prosecutor brought against Michaels.

There were three grand jury indictments against Michaels, on June 6, 1985, July 30, 1985, and November 21, 1985. Michaels was arrested after the first indictment, on June 12, 1985. In April 1988 a jury convicted her on 115 counts of aggravated sexual assault, sexual assault, endangering the welfare of the children, and terroristic threats. *Michaels*, 136 N.J. at 305-306, 642 A. 2d at 1375-1376. The New Jersey Appellate Division reversed the convictions on March 26, 1993 and remanded for a new trial.

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[1]Citations to the District Court and Third Circuit opinions will be preceded by the letters "Sa" for the appendix to the petition for certiorari and "PSa" for the supplemental appendix, with parallel citations to the reported cases.

State v. Michaels, 264 N.J.Super. 579, 629-632, 625 A. 2d 489, 516-518 (App. Div. 1993). The Appellate Division directed that a pretrial hearing would be required to assess the reliability of the children's testimony and statements if the prosecutor decided to retry the case. The Supreme Court of New Jersey agreed that a pretrial hearing was required, addressing the admissibility of this evidence as the sole issue on a petition for certification by the prosecutor. 136 N.J. at 324, 642 A. 2d at 1385. On December 1, 1994, the prosecutor dismissed all charges against Michaels. PSa8, 50 F. Supp. 2d at 357. Michaels brought this civil damage action under 42 U.S.C. §1983 in the District Court in 1996. *Id.*

The New Jersey Appellate Division decision described the nature of the sexual abuse reported by the children. *Michaels*, 264 N.J. Super. at 588-592, 625 A. 2d at 494-593. The Appellate Division and the New Jersey Supreme Court analyzed the interviewing techniques used by the defendants at length, comparing them to the considerable body of professional literature available in 1993 and 1994, and found that, in hindsight, the methods used were "improper" and that there was a "substantial likelihood" that the evidence was "unreliable." 136 N.J. at 324, 642 A. 2d at 1377; *see, generally*, 264 N.J. Super. 579, 625 A. 2d 489. Nearly all of the articles and other authorities cited by the New Jersey courts were published after the 1985 investigation.

The Third Circuit held that, while improper questioning techniques may violate the constitutional rights of the person being questioned, there is no violation of any constitutional right of a third party. Pa11-12; 222 F.3d at 123. Since the interviewing did not violate Michaels' constitutional rights, the actions of the defendants in investigating the child sexual abuse allegations are protected from Michaels' civil damage claims by qualified immunity. *Id.* The Court also found that the presentation of evidence before the grand jury and at trial was absolutely privileged, even if the statements and

testimony of the children were so unreliable that Michaels' constitutional rights were violated. *Id.* The Third Circuit, in finding that the presentation of evidence was protected absolutely, noted that any harm to a falsely charged defendant is remedied by the safeguards built into the judicial system-probable cause hearings, dismissal of the charges, and state rules of professional conduct governing prosecutors. Pa10; *Id.* at 122. The Third Circuit affirmed the grant of summary judgment to the defendants on the basis of these immunities.

The District Court had taken a step further, and also correctly held that, even if the questioning of the children violated a constitutional right, the methods for interviewing victims of child sexual abuse were not clearly established until at least 1993, when the New Jersey appellate court first ruled in this case. PSa22-29; 50 F.Supp. 2d at 363-366. The District Court said that "[d]fendants are not required to predict what tenets will emerge in the area of interviewing alleged child sexual abuse victims," "nor are they required to pay for their mistakes that predated and, indeed, inspired, a change in the law." PSa26-27; 50 F.Supp. 2d at 365.

Michaels' constitutional rights have been vindicated by the reversal of her conviction. The actions of Louis Fonnelaras in investigating the complaints of child sexual abuse satisfy the standard for qualified immunity, and the presentation of evidence to the grand jury and the trial court is protected by absolute immunity. Under the circumstances of this case, Michaels is not entitled to an additional civil damages remedy under 42 U.S.C. §1983 against Louis Fonnelaras. Her petition for a writ of certiorari should be denied.

SUMMARY OF ARGUMENT

Margaret Kelly Michaels has failed to establish that there are special and important reasons to review the decision of the Third Circuit that the investigators and prosecutor are entitled

to qualified and absolute immunity. The criminal process provided her with a remedy, the reversal of her conviction and the requirement that a hearing be held before the evidence developed in the investigation could be used against her in a new trial. The prosecutor has dismissed the charges. The judicial process has protected her constitutional rights. *See Burns v. Reed,* 500 U.S. 478, 492, 11 S. Ct. 1934, 1942, 114 L. Ed. 2d 547, 562 (1991).

A money damages remedy is not needed to reinforce the admonition to government officials that the techniques they use in investigating child sexual abuse complaints can have a profound effect on the reliability of the evidence presented at trial. There is no genuine conflict in the circuits on the standards for qualified and absolute immunity in child sexual abuse cases. The circumstances of this case are unlikely to be repeated. This high profile prosecution of allegations of child sexual abuse led to the development of a body of information analyzing and criticizing the methods used to interview the children and it is unlikely that government officials would use those methods in another case.

The defendants have satisfied the standards for qualified and absolute immunity. Fonnelaras did not violate any clearly established constitutional right of Michaels when he interviewed the children, and the use of the children's statements and testimony by the prosecutor to seek a grand jury indictment and conviction at trial was absolutely privileged. The Third Circuit's analysis follows the functional approach used in *Burns* and other cases. This is not a case of fabrication of evidence or coercion of a confession, where the constitutional right is clearly established.

The Third Circuit relied primarily on *Buckley v. Fitzsimmons*, 20 F. 3d 789 (7th Cir. 1994), *cert. den.* 513 U.S. 1085, 115 S.Ct. 740, 130 L. Ed. 2d 642 (1995), to hold that the later presentation of evidence at trial does not abrogate qualified immunity otherwise available for

investigatory functions. The dissent in that case does not, as Michaels argues, create the kind of conflict that requires review by this Court. The decisions in this case and in *Buckley* can also be reconciled with the Tenth Circuit's decision in *Clanton v. Cooper*, 129 F.3d 1147 (10th Cir. 1997), because the challenged evidence in *Clanton* was not presented in a judicial proceeding, and the police officer's use of a coerced confession to obtain an arrest warrant violated a clearly established constitutional right. Here, the evidence was only used in judicial proceedings that have traditionally been protected by absolute immunity and the methods of interviewing child sexual abuse victims were not clearly established.

The Third Circuit did not reach the issue of whether the constitutional right alleged to have been violated was clearly established. The District Court held that constitutionally acceptable methods of questioning children were not clearly established in 1985, when the investigation occurred. PSa28, *Michaels*, 50 F. Supp. 2d at 365-366. This additional reason would result in the dismissal of the complaint against the defendants here.

REASONS WHY THE PETITION SHOULD BE DENIED

THE THIRD CIRCUIT CORRECTLY DETERMINED THAT QUALIFIED AND ABSOLUTE IMMUNITY PROTECT THE INVESTIGATORS AND PROSECUTOR FROM MICHAELS' CIVIL DAMAGE CLAIM AND THE THIRD CIRCUIT'S DECISION IS NOT IN CONFLICT WITH DECISIONS IN OTHER CIRCUITS.

Michaels contends that the application of qualified and absolute immunity leaves her and other criminal defendants without a damages remedy when their constitutional rights may be violated during the investigation and prosecution of allegations of child sexual abuse. The decisions of the New

Jersey Appellate Division and the New Jersey Supreme Court protected her right to a fair trial under the Due Process Clause of the Fourteenth Amendment by reversing her conviction and requiring a hearing to determine the reliability of the statements and testimony of the child victims before this evidence could be used against her in a new trial. *See*, *Michaels*, *supra,* 136 N.J. at 316, 642 A. 2d at 1380 (1993). Although she requested that the indictment be dismissed, the Appellate Division declined to do so. *State v. Michaels*, 264 N.J.Super. 579, 625 A. 2d 489 (App. Div. 1993). There is no finding by a court that her arrest and detention after indictment by the grand jury were in violation of the Fourth Amendment protection against seizure without probable cause. Moreover, Michaels raised the issue of her pre-conviction detention for the first time on appeal to the Third Circuit, and her claims in this regard would be time-barred. Michaels' ability to collect damages from government employees is at stake here, but the protection of her constitutional rights is not.

It is well settled that immunities apply to protect government officials in §1983 damages cases. *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed. 2d 396 (1982) (qualified immunity for certain government functions); *Imbler v. Pachtman*, 424 U.S. 409, 96 S.Ct. 984, 47 L. Ed. 2d 128 (1976) (absolute immunity of prosecutor). As this Court said twenty-five years ago in *Imbler*, "To be sure, this immunity does leave the genuinely wronged defendant without civil redress against a prosecutor whose malicious or dishonest action deprives him of liberty." 457 U.S. at 427, 102 S. Ct. 984, 993, 47 L. Ed. 2d at 141. The analysis supporting these immunities balances the compelling policy reasons for shielding public officials from damages suits for their actions in investigating and prosecuting allegations of criminal conduct against the importance of vindicating constitutional rights by the payment of damages in addition to other remedies. *Id*. In every case where an immunity applies, the plaintiff in a §1983 case will be without a civil

damages remedy. The lack of a damages remedy for Michaels is not a reason to review the Third Circuit opinion dismissing her claims.

A government official is entitled to qualified immunity from civil damages if his conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *Harlow*, 457 U.S. at 818, 102 S. Ct. at-2738, 73 L. Ed. 2d at 410. "The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton,* 483 U.S. 635, 640, 107 S. Ct. 3034, 3039, 97 L. Ed. 2d 523, 531 (1987). The unlawfulness must be apparent. *Ibid*. The government official must be able to reasonably anticipate which actions will subject him or her to a damages suit. Immunity defenses should be decided on summary judgment to avoid subjecting government officials to the disruption and costs attendant to discovery and trial. *Harlow*, 457 U.S. at 818, 102 S. Ct. at 2738, 73 L. Ed. 2d at 410-411.

The inquiry into whether qualified immunity applies has been characterized as having two components. First, a court must determine whether there has been a violation of a constitutional right, and, second, whether the constitutional right was clearly established at the time of the violation. *Seigert v. Gilley*, 500 U.S. 226, 111 S. Ct. 1789, 114 L. Ed. 2d 277 (1991). The Third Circuit in this case held that there was no violation of Michaels' constitutional rights by the investigators in this case because the interviews of the children did not violate Michaels' constitutional rights. It was only when the prosecutor presented the children's statements and testimony to the grand jury and at trial that a constitutional violation could have occurred. The acts surrounding the selection and presentation of this evidence to the grand jury and at trial were protected by absolute immunity. Therefore, the Third Circuit concluded, there was no constitutional violation and no need to analyze whether

constitutionally acceptable methods for questioning the child sexual abuse victims were clearly established in 1985.

Michaels urges this Court to adopt the dissent in *Buckley v. Fitzsimmons*, 20 F. 3d 789 (7th Cir. 1994), *cert. den.* 513 U.S. 1085, 115 S.Ct. 740, 130 L. Ed. 2d 642 (1995), where Judge Fairchild would have abrogated a prosecutor's absolute immunity if the presentation at trial of evidence the prosecutor allegedly fabricated was the but-for cause of a constitutional violation. This Court has already reviewed and denied the petition for certiorari in *Buckley* and thereby declined to adopt the reasoning in Judge Fairchild's dissent. Michaels styles the dissent as creating a "conflict" with the majority opinion but this is not the kind of conflict that warrants review. *Buckley* is simply a case where there is a dissenting opinion, which, by definition, would be at a variance with the majority.

Michaels cites *Clanton v. Cooper*, 129 F.3d 1147 (10th Cir. 1997), as a case in another circuit that is in conflict with the Third Circuit holding in this case. The Third Circuit took care to distinguish *Clanton*, which held that a police officer who presented a coerced confession to a magistrate to obtain an arrest warrant was not entitled to qualified immunity. Here, the investigators took no action with respect to the children's statements or testimony that violated Michaels' constitutional rights and their qualified immunity is preserved. The contested evidence was only presented to the grand jury and at trial, actions that are traditionally protected by absolute immunity.

The Third Circuit did not err in distinguishing *Clanton*, as Michaels argues, because it was under the impression there was evidence other than the children's statements and testimony. The Third Circuit's analysis depends on the type of judicial proceeding and the immunity applicable to the presentation of evidence at that type of proceeding. Whether there was corroborating evidence in addition to the children's statements and testimony did not enter into its reasoning.

Immunity analysis focuses on the nature of the function performed, not the identity of the person who performed it. *Buckley v. Fitzsimmons*, 509 U.S. 259, 269, 113 S. Ct. 2606 2613, 125 L. Ed. 2d 209, 223 (1993). The investigators' function here was limited to questioning the children. The function of presenting evidence to a grand jury or at a trial is a separate activity that is entitled to absolute protection under *Imbler* and *Burns*. The safeguards of a judicial proceeding reduce the need for damages actions to control unconstitutional conduct. *Burns*, 500 U.S. at 492, 111 S. Ct. at 1942. Qualified immunity would rarely be available if it were lost solely because the evidence generated in an investigation was later presented to a grand jury or at a trial. It would be contrary to the functional approach to hold the investigators here liable to pay civil damages because the children's testimony and statements were later used in a criminal judicial proceeding.

Clanton is distinguishable for another reason, and that is that the constitutional right not to be deprived of liberty based on a coerced confession or fabricated testimony was clearly established. 129 F.3d at 1154-1155. In contrast, in 1985, there was no clearly established standard for conducting a child sexual abuse investigation. A few circuits have held, in the context of fabricated evidence or coerced confessions, that an investigator or prosecutor performing investigative functions is not entitled to qualified or absolute immunity if the evidence is presented at trial. *Zahrey v. Coffey*, 221 F.3d 342 (2d Cir. 2000); *Spurlock v. Satterfield*, 167 F. 3d 995 (6th Cir. 1999). In *Coffey*, the Second Circuit held that there was a clearly established constitutional right not to be deprived of liberty as a result of the fabrication of evidence by a government officer acting in an investigative capacity. 221 F. 3d at 349. In *Satterfield*, the Court found a violation of a constitutional right because a reasonable police officer would know that the fabrication of evidence violates an individual's constitutional rights. 167 F. 3d at 1005. Since the right in those cases was clearly established, the defendants could not

meet the test for qualified immunity. The fact that the evidence was later used against the criminal defendant was more relevant to causation than to the availability of an immunity.

This case does not involve the fabrication of evidence or coercion of adult witnesses. Instead, the state court held that the manner of questioning the children was improper based on the court's comprehensive review of literature on interviewing child victims of sexual abuse some eight years after the defendants here conducted the interviews. *Michaels*, 264 N.J. Super. at 622-630, 625 A. 2d at 511-516. All except one of the many authorities that the court discussed were published after 1985. Indeed, the questioning of child victims of sexual abuse remains problematic. The Ninth Circuit recently held that:

> there is no constitutional due process right to have child witnesses, in a child sexual abuse investigation, interviewed in a particular manner or pursuant to a certain protocol. Devereaux has failed to show that the state defendants violated a constitutional right that is sufficiently particularized so that a reasonable official would understand that any due process right was violated. [*Devereaux v. Perez*, 218 F. 3d 1045, 1053-1054(9th Cir. 2000)]

The Eighth Circuit earlier rejected a §1983 damages claim in a case where a conviction for sexual abuse was overturned under circumstances nearly identical to those here, in *Myers v. Morris*, 810 F. 2d 1437 (8th Cir.), *cert. den.*, 484 U.S. 828, 108 S. Ct. 97, 98 L. Ed. 2d 58 (1987), abrogated on other grounds, *Burns*, *supra*. As the Court said in *Myers*, "[w]hile the record contains examples of investigative

mistakes and flawed interrogation, particularly from the standpoint of successful prosecution of those implicated by children who have experienced extensive questioning, an imperfect investigation without more does not deprive the investigators of qualified immunity." *Id*. at 1460. The conclusion of the *Myers* Court that the interviewing conduct occurred in a "grey area of investigative procedure as to which there were, and probably still are, less than clearly established legal norms" is apt here, where the investigation took place contemporaneously with the one in *Myers*. *Id*. at 1461. The same techniques were used here as in *Myers*--continued questioning about specific acts despite the victim's initial denials, multiple interviews, use of anatomically correct dolls, direct questions regarding touching parts of the body, and questioning by a person the child may have wished to please. *Id*. at 1461.

The Circuit Court of Appeals. that denied qualified immunity in *Coffey*, *supra*, a fabrication case, found that there was qualified immunity in a case involving suspicion of child sexual abuse, in *Tenenbaum v. Williams*, 193 *F. 3d* 581 (2d Cir. 1999). The Second Circuit recognized in *Tenenbaum* that there are heightened societal interests in the protection of child victims of sexual abuse. Such concerns include the safety and welfare of children from the point of view of the community and the individual child's psychological well-being. "When child abuse is asserted, the child's welfare predominates over other interests of her parents and the State." *Id*. at 594. These compelling interests distinguish child sexual abuse cases from other kinds of criminal proceedings.

The Court held in *Tenenbaum* that child welfare caseworkers were entitled to qualified immunity after they removed a five year old child from school and took her to a hospital, where doctors performed a physically intrusive examination to determine whether she had been sexually abused. The caseworkers did not obtain the parents' consent

or a court order, and the suspicion of sexual abuse was based on minimal and ambiguous communications by the girl to her teacher. The Court emphasized the difficult choices faced by those who are investigating allegations of abuse of children. If they err in interrupting parental custody they risk accusations that they are violating the parents' constitutional rights, but if they err in not removing the child, the child may be injured or say her constitutional rights are being violated. Caseworkers of reasonable competence could disagree on whether this action was legal. *Id.* at 596. The protection of qualified immunity is particularly important in this context to enable government officials investigating child abuse allegations "to fulfill their crucial duties safely and effectively." *Id.* at 596-597. The Second Circuit's generous interpretation of qualified immunity in a child sexual abuse case in *Tenenbaum* was notably different from its denial of immunity for the evidence fabrication allegations in *Coffey*.

The Third Circuit correctly decided that no constitutional right had been violated and no damages are available against these officials. Summary judgment would be affirmed, as well, based on the second part of the *Seigert* immunity analysis, because the methods of questioning child sexual abuse victims were highly undeveloped in 1985, as recognized in *Myers*, *supra*, and have been the subject of extensive and conflicting commentary in the professional literature since then. *See*, *State v. Michaels*, 136 N.J. 299, 642 A. 2d 1372 (1994); *State v. Michaels*, 264 N.J. Super. 579, 625 A. 2d 489 (App. Div. 1993); *Devereaux*, *supra*. The questioning of the children in this case did not violate clearly established constitutional techniques for obtaining reliable evidence from child victims of sexual abuse. *Devereaux* and *Tenenbaum*, decided in 2000 and 1999, respectively, strongly suggest that acceptable methods for investigating these kinds of allegations are still far from clear, and decisions by investigators that may seem shocking in hindsight are still entitled to qualified immunity.

Michaels' constitutional rights were protected by the state court ruling that the children's statements and testimony could not be used to prove criminal charges against her until or unless the evidence was proven to be reliable in a hearing before a new trial on the charges. That decision vindicated any potential violations of her constitutional rights. This is not a case where the individual defendants should be made to pay money damages to reinforce the protection of the constitutional rights of those who are accused of child sexual abuse. The defendants are entitled to qualified and absolute immunity under well established principles that are not in conflict in the circuits as those principles have been applied to this sensitive and uncertain area of questioning child sexual abuse victims. The petition for a writ of certiorari should be denied.

CONCLUSION

For the reasons stated the petition of Margaret Kelly Michaels for a writ of certiorari should be denied.

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No. 00-361

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

MARGARET K. MICHAELS,

Petitioner,

v.

GEORGE McGRATH, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS GEORGE McGRATH AND RICHARD MASTROANGELO

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REASONS FOR DENYING THE WRIT

The questions presented in sequence by this matter are as follows: one, whether Essex County Prosecutor's Office Investigators George McGrath's and Richard Mastroangelo's (hereinafter "Respondents") participation in the investigation of Petitioner, which consisted of interviewing adolescent victims of sexual abuse, deprived Petitioner of a constitutional right; two, whether the use of the investigation at her trial deprived Petitioner of a constitutional right; and three, whether Respondents' interviewing techniques violated clearly established rules at the time of the investigation as to negate Respondents' qualified immunity. While stated differently, the Petitioner's "question presented" acknowledges the second issue, but overlooks the first and third. Pet. at i.

Petitioner argues that the decision below leaves an entire class of criminal defendants without the benefit of § 1983 redress by finding that constitutionally protected rights do not exist when improperly obtained statements are used against them in a criminal prosecution. Pet. at 8. In support of this argument, Petitioner advocates that this Court adopt the "but for" causation analysis contained in the dissenting opinion of *Buckley v. Fitzsimmons*, 20 F.3d 789 (7th Cir. 1994), *cert. denied*, 513 U.S. 1085, 115 S. Ct. 740, 130 L. Ed. 2d 642 (1995). Pet. at 8, 9, 10. The Petitioner maintains that not only are the *Buckley* majority and dissent in conflict but that the majority is inconsistent with the broad scope of civil remedies intended by § 1983. Pet. at 7. The Petitioner contends that *Buckley* is inconsistent with *Clanton v. Cooper*, 129 F.3d 1147 (10th Cir. 1997) and that *Clanton* is inconsistent with the Third Circuit opinion below. Pet. at 7, 9.

Respondents' investigation techniques neither implicated nor violated Petitioner's constitutional rights. Pet., App. 12. Assistant Prosecutor Sara Sencer-McArdle is entitled to absolute immunity in offering the testimony at grand jury and trial. Pet., App. 12. Respondents are entitled to qualified immunity for their participation in the investigation. Pet., App. 12. Even assuming Petitioner's constitutional rights were impeded, she cannot show that Respondents violated clearly established statutory or constitutional rights which a reasonable person would have known, necessary to negate Respondents' qualified immunity. *Michaels v. New Jersey*, 50 F. Supp. 2d 353, 365 (D.N.J. 1999). The Petitioner's proposed but for causation analysis violates the long established principals of absolute prosecutorial immunity and qualified immunity for law enforcement officers. Moreover, *Buckley* and *Clanton* are reconcilable with the Third Circuit decision below. The Third Circuit's ruling was proper in all respects and Respondents respectfully urge this Honorable Court to deny the Petition for Writ of Certiorari.

I.

PETITIONER'S CONSTITUTIONAL RIGHTS WERE NOT IMPLICATED BY RESPONDENTS' INTERROGATION OF THE VICTIMS

The Third Circuit opinion upheld the District Court's decision which determined that Petitioner could not demonstrate a violation of her constitutional rights by Respondents' alleged improper interviewing techniques of the victims. Pet., App. 12. That is because rights personal to their holders may not be enforced by third parties. *Warth v. Seldin*, 422 U.S. 490, 498-502, 509-510, 95 S. Ct. 2197,

2204-2207, 2210-2211, 45 L. Ed. 2d 343, 354-356, 360-361 (1975). This issue is one of standing which involves two inquiries: first, whether the proponent of a particular legal right has asserted an "injury in fact", and second, whether the proponent has alleged that his own legal rights were infringed rather than basing his claim for relief upon third parties. *Singleton v. Wulff*, 428 U.S. 106, 112, 96 S. Ct. 2868, 2873, 49 L. Ed. 2d 826, 832 (1976). In the Fourth Amendment context, standing turns on whether an individual maintains a legitimate expectation of privacy in the place searched or item seized. *Katz v. United States*, 389 U.S. 347, 353, 88 S. Ct. 507, 512, 19 L. Ed. 2d 576, 583 (1967). *See also United States v. Payner*, 447 U.S. 727, 100 S. Ct. 2439, 65 L. Ed. 2d 468 (1980) (defendant charged with falsifying federal income tax return by denying that he maintained a foreign bank account lacked legitimate expectation of privacy under the Fourth Amendment to challenge admission of documents illegally seized from another which showed defendant's ownership interest in such an account).

At the investigation stage, Respondents' interrogation techniques did not violate Petitioner's constitutional rights, but only, perhaps, the rights of the child victims being interviewed. *Michaels*, 50 F. Supp. 2d at 363; *citing Buckley*, 20 F.3d at 794-795. The *Buckley* reasoning, which was relied upon heavily by the Third Circuit herein, presented the following hypothetical to synthesize this issue:

> Let us suppose the prosecutors put Cruz on the rack, tortured him until he named Buckley as his confederate, and then put the transcript in the drawer, or framed it and hung it on the wall but took no other step, or began a prosecution but did

> not introduce the statement. Could Buckley collect damages under the Constitution? Surely not; Cruz himself would be the only victim.

Buckley, 20 F.3d at 795. Indeed, inappropriate interviewing tactics potentially violate the rights of the person interrogated, not third parties. *Id.* Here, Petitioner does not seek relief from the interrogation of herself, only the child victims. As such, Petitioner lacks standing to assert a constitutional claim.

II.

THE USE OF RESPONDENTS' INVESTIGATION AT PETITIONER'S TRIAL IS SHIELDED BY ABSOLUTE PROSECUTORIAL IMMUNITY

The use of the pre-indictment investigation, in the form of the victims' testimony at trial, may have implicated Petitioner's constitutional rights. *Michaels*, 50 F. Supp. 2d at 363. That use, however, was found by both the District and Third Circuit Courts to be shielded by absolute prosecutorial immunity for Assistant Prosecutor, Sara Sencer-McArdle. Pet., App. 12. Absolute immunity exists for officers who perform judicial or quasi-judicial functions such as initiating a prosecution, preparing for trial and presenting the State's case. *Imbler v. Pachtman*, 424 U.S. 409, 420, 96 S. Ct. 984, 990 47 L. Ed. 2d 128, 137-138 (1976).

The Third Circuit Court upheld the District Court's ruling which stated that the Respondent investigators' participation in the investigation of Petitioner is protected by qualified immunity. Pet., App. 12. Qualified immunity

applies to government officials, such as law enforcement officers, performing discretionary functions. *Harlow v. Fitzgerald*, 457 U.S. 800, 816, 102 S. Ct. 2727, 2739, 73 L. Ed. 2d 396, 409 (1982). It shields law enforcement officers from liability unless they "violate clearly established statutory or constitutional rights which a reasonable person would have known." *Harlow*, 437 U.S. at 818, 102 S. Ct. at 2738, 73 L. Ed. 2d at 410-411. Since the Respondents' investigation did not violate Petitioner's constitutional rights, their entitlement to qualified immunity must be left undisturbed.

Petitioner does not challenge the qualified immunity granted Respondents in the decision below. Rather, she argues that the Third Circuit decision leaves an entire class of criminal defendants without the benefit of § 1983 redress by finding that constitutionally protected rights do not exist when improperly obtained statements of third parties are used against them in a criminal prosecution. Pet. at 7. While the Court of Appeals' decision left Petitioner without § 1983 civil recourse, Petitioner does have an active common law malicious prosecution claim in the New Jersey State Court. *Michaels*, 50 F. Supp. 2d at 366-367. Like the Seventh Circuit in *Buckley*, the Third Circuit herein recognized the unavailability of § 1983 recourse, but relying on *Imbler*, concluded that the policies served by absolute prosecutorial immunity outweighed the lack of § 1983 redress. Pet., App. 9, 10. Amongst other policy reasons, the *Imbler* Court stated the "public trust of the prosecutor's office would suffer if he were constrained in making every decision by the consequences in terms of his own potential liability in a suit for damages." *Imbler*, 424 U.S. at 424-425, 96 S. Ct. at 992-993, 47 L. Ed. 2d at 139-141. The Third Circuit correctly reasoned that the criminal justice system provides

its own remedies to thwart the apparent harm visited upon those wrongfully convicted. Pet., App. 10. Those remedies include probable cause hearings, dismissal of criminal charges and the state Rules of Professional Conduct. *See Kulwicki v. Dawson*, 969 F.2d 1454, 1464 (3d Cir. 1992). The Third Circuit is rightly convinced that the above remedies are sufficient to discourage prosecutors from coercing witnesses to make unreliable statements against a criminal defendant. Pet., App. 10. Deterrence of future abuses of power by individuals acting under color of state law is an important purpose of § 1983. *City of Newport v. Fact Concerts, Inc., R.I.*, 453 U.S. 247, 101 S. Ct. 2748, 69 L. Ed. 2d 616 (1981). As such, civil recourse is not the only goal of § 1983 as Petitioner's argument suggests.

III.

ASSUMING ARGUENDO THAT PETITIONER'S CONSTITUTIONAL RIGHTS WERE INFRINGED, IT CANNOT BE SHOWN THAT RESPONDENTS VIOLATED CLEARLY ESTABLISHED LAWS AT THE TIME OF THE INVESTIGATION

In the instant matter, Petitioner's conviction was overturned by the Superior Court of New Jersey, Appellate Division and affirmed by its Supreme Court which deemed the victims' statements unreliable due to improper interrogation techniques. *State v. Michaels*, 264 N.J. Super. 579 (App. Div. 1993); *State v. Michaels*, 136 N.J. 299 (1994). Subsequently, the Essex County Prosecutor's Office administratively dismissed the charges. *Michaels*, 50 F. Supp. 2d at 357. The Court decisions, which gained national recognition, were sufficient to ensure that prosecutors of sexual offenses refrain from overzealous interrogation

tactics. In fact, petitioner's criminal case inspired a change in the law. *Michaels*, 50 F. Supp. 2d at 364-365. *See Karol L. Ross, State v. Michaels: A New Jersey Supreme Court Ruling With National Implications*, 78 Mich. B.J. 32, 32 (1999) ("*Michaels* is one of the first cases that attempts to resolve the issue of the reliability of testimony of the alleged child abuse victim, thus filling an important void").

The Third Circuit left undisturbed the District Court's ruling that the Respondents' techniques used to interview the victims during the course of the investigation did not violate Petitioner's rights. Pet., App. 12. Nevertheless, the District Court entertained the hypothetical that Respondents violated Petitioner's rights to determine whether those rights were clearly established at the time of the investigation. *Michaels*, 50 F. Supp. 2d 353, 363-366. The District Court framed the issue as follows: "in 1985, did the defendants' interrogation violate 'constitutional standards protecting accused persons from suggestive or coercive interrogation of witnesses and victims'." *Id.* at 364. The District Court engaged in an exhaustive analysis from a legal and psychological standpoint to ascertain the accepted protocols for investigating and interviewing adolescent victims of sexual abuse. *Id.* at 363-365. The District Court correctly ruled that Petitioner "utterly failed to establish that the contours of that right were clearly established at the time of the violation, nor has she demonstrated that defendants acted unreasonably in light of what limited knowledge they had." *Id.* at 365-366. Because the Third Circuit concluded that the Respondents' questioning of the children did not violate Petitioner's constitutional rights, it never addressed this issue. Pet., App. 12.

The Petition fails to address whether Respondents' investigation violated clearly established statutory or constitutional rights which a reasonable person would have known. Thus, this Court must consider this issue abandoned by Petitioner.

IV.

THE BUT FOR CAUSATION ANALYSIS PROPOSED BY THE BUCKLEY DISSENT IS WITHOUT MERIT

Petitioner urges this Court to adopt the but for causation analysis suggested in the dissenting opinion in *Buckley* to resolve the qualified immunity issue. *Buckley*, 20 F.3d at 800 (Fairchild, J., dissenting). Pet. at 8. That dissent proposed that prosecutors would not be immune from liability for their non-advocacy wrongful conduct if a plaintiff could demonstrate that an indictment and trial would not have occurred but for the wrongful conduct. *Id.* Conveniently, Petitioner submits that her indictment and trial would not have occurred but for Respondents' unlawful conduct. Neither federal court decision below, nor Petitioner's State court criminal proceedings came to such a conclusion. Pet. at 10.

This Court, like the District Court and Third Circuit Court below, must reject Petitioner's invitation to accept the but for causation analysis proposed in the *Buckley* dissent. This Petition, like the Petition for Writ of Certiorari in *Buckley* must also be denied. Petitioner fails to support her argument with a single majority opinion which adopts the but for causation rationale. More than six years have elapsed since that dissent was authored and no court has embraced the idea. If accepted, that rationale would, potentially, erode

the long established principles of absolute prosecutorial immunity set forth in *Imbler*, *supra* and qualified immunity for law enforcement officers contained in *Harlow*, *supra*. Indeed, the but for causation approach would prevent the vigorous performance of a prosecutor's duty for fear of liability. *Imbler*, 424 U.S. at 424-25, 96 S. Ct. at 992-993, 47 L. Ed. 2d at 139-141.

V.

THE THIRD CIRCUIT OPINION IS CONSISTENT WITH *BUCKLEY* AND *CLANTON*

Petitioner maintains that the opinion below is inconsistent not only with the *Buckley* dissent but also with *Clanton v. Cooper*, 129 F.3d 1147 (10th Cir. 1997). Pet. at 7. Petitioner argues that *Clanton* mandated that neither investigators nor prosecutors should be immune from liability for their role in obtaining improper statements. Pet. at 10.

Petitioner's argument that the Third Circuit opinion below is inconsistent with *Clanton* is unpersuasive. Pet. at 9. In fact, it misrepresents the *Buckley* and *Clanton* distinction. That distinction was accurately crystallized by the Third Circuit Court below:

> The distinction between *Buckley* and *Clanton* is the use of the improperly obtained statements. In *Buckley*, the witnesses' coerced testimony was presented at trial. The court held that the prosecutor was absolutely immune from an action for damages under § 1983 under *Imbler*. *See* 20 F.3d at 795. In *Clanton* on the other hand, the police used another person's coerced

confession in an affidavit to obtain an arrest warrant for Clanton. 129 F.3d at 1151. In using a coerced statement in this manner, the court held in *Clanton* that the officers were not entitled to qualified immunity. *See Id.* at 1159; see also *Malley v. Briggs*, 475 U.S. 335, 343 (1986) (holding that an officer applying for a warrant without probable cause may be entitled to qualified immunity but is not entitled to absolute immunity). Here, the only use of the improperly obtained statements against Michaels was the presentation of the children's testimony before the grand jury and at the criminal trial. Until the children testified against her, Michaels' constitutional right to due process was not violated by the techniques used to interview the children. Pet. App. 11, 12.

The Third Circuit opinion below is consistent with *Clanton*. In *Clanton*, the investigators were denied qualified immunity because they intentionally swore to the veracity of an informer's confession in support of an arrest warrant while knowing the confession was false. *Clanton*, 129 F.3d at 1154. That affidavit, coupled with its use to arrest plaintiff, was found to have violated plaintiff's clearly established Fourth Amendment rights. *Id.*

In the instant matter, the Respondent investigators did not use the fruits of their investigation to secure an arrest warrant for Petitioner. Rather, the Respondent prosecutor empaneled three grand juries to evaluate the proofs. Pet., App. 5, 6. If the Respondents sought an arrest warrant, they would have been granted qualified immunity subject to a finding that their investigation violated clearly established

principles which a reasonable person would have known. *Harlow*, 457 U.S. at 816, 102 S. Ct. at 2737 73 L. Ed. 2d at 409. Since the prosecutor presented the matter to the three grand juries she is entitled to absolute immunity for offering the victims' testimony in that capacity and at trial. *See Imbler*, 424 U.S. at 420, 96 S. Ct. at 990 47 L. Ed. 2d at 137-138.

After considering the relevant arguments and applicable law, the Third Circuit properly held that Petitioner did not demonstrate a violation of her constitutional rights when the Respondents employed improper interview techniques with the victims. Pet., App. 12. The Panel properly ruled that all Respondents were entitled to qualified immunity for their actions and that Assistant Prosecutor, Sara Sencer-McArdle was entitled to absolute immunity for offering the children's testimony before the grand jury and at trial. Pet., App. 12.

CONCLUSION

For all the foregoing reasons, Respondents respectfully request that this Honorable Court deny the Petition.

Respectfully submitted,

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BRIEF IN OPPOSITION FOR RESPONDENT SARA SENCER-McARDLE

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REASONS FOR DENYING THE WRIT

MICHAELS HAS FAILED TO SET FORTH A COMPELLING REASON FOR GRANTING HER PETITION FOR A WRIT OF CERTIORARI. HER PETITION, THEREFORE, MUST BE DENIED.

Supreme Court Rule 10 ("Considerations Governing Review on Certiorari") sets forth the rationale underlying the Court's basis for granting a party's petition for certiorari. As stated in pertinent part, Supreme Court Rule 10 expressly states that "review on a writ for certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons."

McArdle respectfully submits that a careful review of Margaret Kelly Michaels' (hereinafter "Michaels") petition reveals the absence of a single compelling reason for granting her writ of certiorari. McArdle respectfully submits this brief in opposition to Michaels' petition for a writ of certiorari and respectfully beseeches the Court, for all of the following reasons, to deny Michaels' petition.

Michaels contends that this Court must grant certiorari to correct the Court of Appeals' allegedly erroneous determination that Michaels has no right to redress under 42 U.S.C. § 1983 for the State's use of "improperly obtained statements of third parties" against her in the criminal prosecution of her. She argues:

> The Court of Appeals' decision is based on the district court's decision which leaves an entire class of criminal defendants without the benefit of § 1983 redress by finding that constitutionally protected rights do not exist when improperly obtained statements of third parties are used against them in a criminal prosecution.

(Pb at 7.)

In furtherance of her position, Michaels sets forth three alleged deficiencies in the Court of Appeals' reasoning, which purportedly require this Court's intervention. (Pb at 7.) McArdle respectfully submits that a searching review of each of these alleged deficiencies will lead this Court to the inescapable conclusion that none of them, whether viewed together or separately, constitutes sufficient reason for granting Michaels' petition.

Furthermore, Michaels' petition incorporates an argument questioning the district court's holding that McArdle was entitled to absolute immunity for all of her prosecutorial functions. This is an argument that Michaels never articulated or advanced in the court below. Michaels' appeal to the United States Court of Appeals for the Third Circuit challenged only the district court's determination that McArdle and the other defendants were entitled to qualified immunity for certain of their actions. Michaels failed to seek appellate review of the district court's ruling as to the applicability of absolute immunity to most of McArdle's actions. Now, Michaels is attempting to assert for the first time in the appellate process an argument in opposition to the affirmative defense that was raised by McArdle in the district court. This Court should not consider this purported issue since Michaels did not seek relief in the Court of Appeals from the district court's determination. The Supreme Court will not ordinarily consider issues that are neither raised nor considered by the Court of Appeals. *Pennsylvania Dept. of Corrections v. Yeskey*, 524 U.S. 206, 118 S. Ct. 1952, 141 L. Ed. 2d 215 (1998). Furthermore, the district court and the Court of Appeals for the Third Circuit both found that McArdle was entitled to absolute immunity for her trial work as well as for all of her actions involving the three Grand Juries once probable cause was established in her mind. That finding was consistent with the applicable case law. Therefore, even if Michaels had perfected her right to appeal the lower courts' determination on that issue to this

Court, it would not be a basis for granting the relief she seeks on the instant petition.

A. The Court Of Appeals' Decision Was Consistent With This Court's Decision In *Imbler v. Pachtman* And More Than Twenty-Five Years Of United States Supreme Court Precedent. For Reasons Of "Stare Decisis", Michaels' Petition For A Writ Of Certiorari Must Be Denied.

The first alleged deficiency Michaels points to as supporting this petition addresses the Court of Appeals' entirely proper reliance upon the Court of Appeals for the Seventh Circuit's opinion in *Buckley v. Fitzsimmons*, 20 F.3d 789 (7th Cir. 1994). Michaels contends:

> The Seventh Circuit's majority opinion in *Buckley v. Fitzsimmons*, 20 F.3d 789 (7th Cir. 1994), *cert. denied*, 513 U.S. 1085, 115 S. Ct. 740, 130 L. Ed. 2d 642 (1995) directly conflicts with the dissenting opinion regarding the existence of a criminal defendants' rights and is inconsistent with the broad scope of the intended civil remedies for a criminal defendant pursuant to 42 U.S.C. § 1983.

(Pb at 7.)

Michaels' initial basis for seeking certiorari in this case is not that this Court's intervention is necessary because "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter." Supreme Court Rule 10(a). Rather, her initial basis for seeking certiorari is her challenge of the Court of Appeals for the Third Circuit's reliance upon a decision from the Seventh Circuit that contained a majority opinion and a dissenting opinion that

were in "direct conflict" with one another. (Pb at 7.) Not surprisingly, Michaels cites no authority from this Court or any other court to suggest that the existence of a strident dissenting opinion in a particular case precludes another court from relying upon that case's majority opinion. Also, as indicated in the complete citation of the *Buckley* opinion referenced above, this Court had the opportunity to grant a petition for a writ of certiorari from the decision of the Court of Appeals for the Seventh Circuit and declined to do so. 513 U.S. 1085, 115 S. Ct. 740, 130 L. Ed. 2d 642 (1995).

Furthermore, the jurisprudence of this Court and the various United States Courts of Appeals in this area belies Michaels' assertion that the Court of Appeals' decision in this case is consistent with only the majority opinion of a divided United States Court of Appeals for the Seventh Circuit in *Buckley*. Rather, as set forth at length in the Court of Appeals' opinion and the district court's opinion, both lower courts modeled their opinions after this Court's jurisprudence, beginning with this Court's decision in *Imbler v. Pachtman*, 424 U.S. 409, 96 S. Ct. 984, 47 L. Ed. 2d 128 (1976).

Justice Stevens discussed 42 U.S.C. § 1983 and this Court's decision to limit the rights of a § 1983 plaintiff to recoup money damages against a prosecutor for functions he or she performed as a prosecutor in the underlying criminal action in *Kalina v. Fletcher*, 522 U.S. 118, 118 S. Ct. 502, 139 L. Ed. 2d 471 (1997). Writing for a unanimous Court, Justice Stevens spoke of the statute's history and purpose:

> Section 1983 is a codification of § 1 of the Civil Rights Act of 1871. The text of the statute purports to create a damages remedy against every state official for the violation of any person's federal constitutional or statutory rights. The coverage of this statute is thus broader than the pre-existing common law of torts. We have nevertheless recognized that Congress intended the statute to be construed in the light of common-law principles that were well settled at the time of its enactment. [Citations omitted.] Thus we have examined common-law doctrine when identifying both the elements of the cause of action and the defense available to state actors.

Kalina, 522 U.S. at 123, 118 S. Ct. at 506.

Justice Stevens then proceeded to discuss in detail this Court's decision in *Imbler*:

> [W]e held that a former prisoner whose conviction had been set aside in collateral proceedings could not maintain a § 1983 action against the prosecutor who had litigated the charges against him. Relying in part on common-law precedent, and perhaps even more importantly on the policy considerations underlying that precedent we concluded that "a state prosecuting attorney who acted within the scope of his duties in initiating and pursuing a criminal prosecution" was not amenable to suit under § 1983. *Imbler*, 424 U.S. at 410, 96 S. Ct. at 985.
>
> Liberally construed, Imbler's complaint included not only a charge that the prosecution had been wrongfully commenced, but also a charge that false testimony had been offered as well as a charge that exculpatory evidence had been suppressed. His constitutional claims were thus broader than any specific common-law antecedent. Nevertheless, relying on common-law decisions providing prosecutors with absolute

> immunity from tort actions based on claims that the decision to prosecute was malicious and unsupported by probable cause, as well as from actions for defamation based on statements made during trial, we concluded that the statute should be construed to provide an analogous defense against the claims asserted by Imbler. *The policy considerations that justified the common-law decisions affording absolute immunity to prosecutors when performing traditional functions applied equally to statutory claims based on the conduct of the same functions.*

Kalina, 522 U.S. at 123-125, 118 S. Ct. at 506-07. Emphasis added.

Justice Stevens continued:

> Those considerations included both the interest in protecting the prosecutor from harassing litigation that would divert his time and attention from his official duties and the interest in enabling him to exercise independent judgment when "deciding which suits to bring and in conducting them in court." *Imbler*, 424 U.S. at 424, 96 S. Ct. at 992. The former interest would lend support to an immunity from all litigation against the occupant of the office whereas the latter is applicable only when the official is performing functions that require the exercise of prosecutorial discretion. Our later cases have made it clear that it is the interest in protecting the proper functioning of the office, rather than the interest in protecting its occupant, that is of the primary importance.

Kalina, 522 U.S. at 125, 118 S. Ct. at 507.

In this matter Michaels alleged that McArdle "deliberately and knowingly submitted misleading and false evidence and testimony to the Grand Jury to maliciously and negligently procure an indictment." (Michaels' Amended Complaint at First Count, ¶ 23.) Furthermore, Michaels alleged that McArdle "deliberately, recklessly, negligently and knowingly submitted misleading false evidence and testimony to the trial jury and as a proximate result thereof, Plaintiff Margaret Kelly Michaels was convicted and subsequently incarcerated." (Michaels' Amended Complaint at First Count, ¶ 24.)

Thus, notwithstanding Michaels' assertions to the contrary, she petitions this Court to overturn established, long-standing jurisprudence. Michaels' allegations against McArdle have consistently been comprised of two prongs. The first prong is that McArdle (either personally or through the Essex County Prosecutor's Office's investigators) utilized improper interrogation techniques to obtain statements from the children who were the alleged victims of sexual abuse at Michaels' hands. The second prong, as set forth in the preceding paragraph, is that McArdle presented the testimony obtained as a result of the allegedly improper interrogation techniques to obtain three Grand Jury indictments and, following a lengthy criminal trial, a conviction of Michaels, which otherwise would not have been obtained.

In an effort to divert this Court's attention from the fact that she seeks the opportunity to prosecute a cause of action against McArdle, which this Court has repeatedly held cannot exist as a matter of law, Michaels has framed the reason underlying her petition as follows:

> THE COURT OF APPEALS' DECISION LEAVES AN ENTIRE CLASS OF CRIMINAL DEFENDANTS WITHOUT THE BENEFIT OF § 1983 REDRESS BY FINDING THAT

CONSTITUTIONALLY PROTECTED RIGHTS DO NOT EXIST WHEN IMPROPERLY OBTAINED STATEMENTS OF THIRD PARTIES ARE USED AGAINST THEM IN A CRIMINAL PROSECUTION.

(Pb at 7.)

In *Imbler*, this Court concluded that the prosecutor's activities at issue "were intimately associated with the judicial phase of the criminal process and thus were functions to which the reasons for judicial immunity apply with full force." *Imbler*, 424 U.S. at 430, 96 S. Ct. at 995. *See also Kalina*, 522 U.S. at 125, 118 S. Ct. at 507. Recently, in *Kalina*, Justice Stevens discussed some of the cases that this Court has decided in the wake of *Imbler* and the Court's reaffirmation of its holding in *Imbler*:

> Subsequent cases have confirmed the importance to the judicial process of protecting the prosecutor when serving as an advocate in judicial proceedings. Thus, in *Burns v. Reed*, 500 U.S. 478, 111 S. Ct. 1934, 114 L. Ed. 2d 547 (1991), after noting the consensus among the Courts of Appeals concerning prosecutorial conduct before grand juries, *id.*, at 490 n.6, 111 S. Ct. at 1941 n.6, we held that the prosecutor's appearance in court in support of an application for a search warrant and the presentation of evidence at that hearing were protected by absolute immunity. *Id.* at 492, 111 S. Ct. at 1942-43. And, in *Buckley v. Fitzsimmons*, 509 U.S. 259, 113 S. Ct. 2606, 125 L. Ed. 2d 209 (1996), we categorically stated that "acts undertaken by a prosecutor in preparing for the initiation of judicial proceedings or for trial, and which occur in the course of his role as an advocate for the State, are entitled to the

> protections of absolute immunity." 509 U.S. at 273, 113 S. Ct. at 2615.

Kalina, 522 U.S. at 125-126, 118 S. Ct. at 507.

The district court granted summary judgment in McArdle's favor with respect to Michaels' § 1983 malicious prosecution claim against her, a decision that was affirmed by the United States Court of Appeals for the Third Circuit. Michaels' § 1983 malicious prosecution claim against McArdle derived from McArdle's alleged submission of false and misleading testimony and evidence by McArdle to the three Grand Juries in order to procure an indictment. Michaels' § 1983 malicious prosecution claim against McArdle also derived from McArdle's alleged submission of false and misleading testimony and evidence to the trial jury in order to obtain a conviction. Thus, Michaels' allegations with respect to McArdle directly addressed McArdle's initiation of the criminal prosecution against Michaels and the manner in which McArdle presented witness testimony and evidence to the Grand Juries and the trial jury.

McArdle's conduct that formed the basis of Michaels' civil action against her is unquestionably conduct for which McArdle as a prosecutor has traditionally been afforded absolute immunity from liability by this Court. "The duties of the prosecutor in [her] role as an advocate for the State involve actions preliminary to the initiation of a prosecution and actions apart from the courtroom." *Buckley*, 113 S. Ct. at 2615, citing *Imbler*, 424 U.S. at 431 n.33. Assuming *arguendo* that McArdle had presented deliberately false and misleading testimony to the Grand Juries and/or the trial jury, her conduct was still within the ambit of her role as an advocate for which she is absolutely immune from liability. "An effort to control the presentation of a witness' testimony

was entitled to absolute immunity because it was fairly within [the prosecutor's] function as an advocate." *Buckley*, 113 S. Ct. at 2615, citing *Imbler*, 424 U.S. at 430 n.32.

The Court of Appeals for the Third Circuit has followed this Court's lead in this area. In *Rose v. Bartle*, 871 F.2d 331 (3d Cir. 1989), the Court of Appeals affirmed the district court's dismissal of a complaint against defendant prosecutors. In doing so the court observed that:

> the plaintiff's allegations involve direct solicitations of testimony for use in the grand jury proceedings. Such solicitations are encompassed within the "preparation necessary to present a case" and therefore are immunized as involving the prosecutors' advocacy functions.

Rose, 871 F.2d at 344.

The court in *Rose* also cited with approval the reliance placed by the district court upon *Tate v. Grose*, 412 F. Supp. 487 (E.D. Pa. 1976) in support of its dismissal of the plaintiff's complaint:

> There is no reason to depart from a rule of absolute prosecutorial immunity merely because the complaint alleges that the defendants not only used perjured testimony against plaintiff but solicited that perjured testimony as well. To allow such an allegation to defeat the prosecutor's immunity would vitiate the *Imbler* holding. Anyone against whom perjured testimony was used could then force the prosecutor to court in a civil damage action simply by reframing the claim to allege that the perjured testimony was solicited.

Rose, 871 F.2d at 344 n.8, citing *Tate*, 412 F. Supp. at 488.

The Court of Appeals for the Third Circuit reiterated its position in *Giuffre v. Bissell*, 31 F.3d 1241 (3d Cir. 1994). In *Giuffre*, the court held that "a prosecutor is absolutely immune when making his decision [to initiate a prosecution] even when he acts without a good faith belief that any wrongdoing occurred." *Id.* at 1352. *See also Rose*, 871 F.2d at 347 n.12.

Recently, the Court of Appeals for the Third Circuit had the opportunity to revisit the issue of a prosecutor's absolute immunity. It did so in a civil action against a variety of State officials arising from the decision not to provide exculpatory evidence to the plaintiff's counsel while the plaintiff was the defendant in the underlying murder trial. In *Smith v. Holtz*, 210 F.3d 186 (3d Cir. 2000), the court noted:

> It was Guida, the prosecutor, who made the decision not to disclose the lifters [the exculpatory evidence] to Smith's counsel. At the time he made that decision Guida represented the Commonwealth's interests, not the interests of Holtz, Dove or Yatron. However, Guida, as prosecutor, has absolute immunity from liability in Smith's § 1983 action so long as he was functioning in his prosecutorial capacity when he made that decision. *Imbler v. Pachtman*, 424 U.S. 409, 96 S. Ct. 984, 47 L. Ed. 2d 128 (1976); *see also Buckley v. Fitzsimmons*, 509 U.S. 259, 113 S. Ct. 2606, 125 L. Ed. 2d 209 (1993) (prosecutor has absolute immunity in § 1983 action for the initiation and pursuit of a criminal prosecution, including presentation of the state's case at trial).

Smith, 210 F.3d at 199-200 n.18.

McArdle respectfully submits that a fair and careful review of the evidence before it will lead this Court to the

inescapable conclusion that, despite Michaels' representations to the contrary, there is nothing here that warrants this Court ignoring its own precedent and creating an arbitrary exception to *Imbler*. As Justice Scalia wrote in his concurring opinion in *Kalina*, "both *Imbler* and the "functional" approach are so deeply embedded in our § 1983 jurisprudence that, for reasons of *stare decisis*, I would not abandon them now." *Kalina*, 522 U.S. at 135, 118 S. Ct. at 512 (Scalia, J., concurring.) Similarly, McArdle respectfully submits that Michaels has not presented this Court with any basis for abandoning them at this time.

B. There Is No Inconsistency Between The Courts Of Appeals That Needs To Be Addressed By This Court. Thus Michaels' Petition For A Writ Of Certiorari Must Be Denied.

Michaels further asserts that certiorari must be granted here to resolve the dispute between the Court of Appeals for the Seventh Circuit in its *Buckley* opinion and the Court of Appeals for the Tenth Circuit in *Clanton v. Cooper*, 129 F.3d 1147 (10th Cir. 1997). (Pb at 7.) She further asserts that certiorari is necessary here because the subject decision of the Court of Appeals for the Third Circuit is inconsistent with *Clanton* and the Court of Appeals' reasoning was materially flawed. (Pb at 9 and 10.) Michaels' position that a conflict between the various Courts of Appeals on the relevant issues herein is completely devoid of merit. No such dispute exists. Thus, for the following reasons, McArdle respectfully submits that the petition for a writ of certiorari to address this non-existent conflict must be denied.

Michaels' assertion that there is a dispute between the decision of the Court of Appeals for the Seventh Circuit in *Buckley* and the Court of Appeals for the Tenth Circuit in *Clanton* is erroneous. In *Clanton*, the Court of Appeals for the Tenth Circuit affirmed a district court's decision that

Agent Cooper of the Oklahoma State Fire Marshal's Office was not entitled to qualified immunity for the methods he employed in obtaining a confession from a third party that was used as the basis for issuing a warrant for the plaintiff's arrest. *Clanton*, 129 F.3d at 1154. The court stated, "Clanton has stated a legally cognizable Section 1983 claim to the extent that she has alleged that Cooper knowingly and intentionally swore to untrue facts in an affidavit to obtain Clanton's arrest warrant." *Id.* at 1155.

In reaching that conclusion the court in *Clanton* ruled that the plaintiff had the right to contest the voluntariness of the third party's confession, which had served as the basis for the warrant for her arrest. *Id.* at 1157. The court observed "a constitutional violation may assist officers in gathering evidence, but the violation has both offended the Constitution and rendered the evidence unreliable. A coerced confession fits into this category." *Clanton*, 129 F.3d at 1157. The court continued by stating "consequently, because the evidence is unreliable and its use offends the Constitution, a person may challenge the government's use against him or her of a coerced confession given by another person." *Clanton*, 129 F.3d at 1157-58.

Seemingly unbeknownst to Michaels, one of the court's bases for its holding was the majority opinion in *Buckley*. ("Confessions wrung out of their makers may be less reliable than voluntary confessions, so that using one person's coerced confession at another's trial violates his rights under the due process clause." *Buckley v. Fitzsimmons*, 20 F.3d 789, 795 (7th Cir. 1994), *Clanton*, 129 F.3d at 1158.) Thus, consistent with the position expressed by the United States Court of Appeals for the Seventh Circuit in *Buckley*, the United States Court of Appeals for the Tenth Circuit in *Clanton* concluded "Clanton may contest the voluntariness of Eave's confession not based on any violation of his

constitutional rights, but rather as a violation of her own Fourteenth Amendment right to due process." *Id.* at 1158.

Michaels ignores the distinction between the State actors who were involved in the *Buckley* and *Clanton* matters. As noted above, the plaintiff in *Clanton* alleged it was Agent Cooper, a State Fire Marshal, whose conduct violated her due process rights. In *Buckley*, the plaintiff alleged that the prosecutor, Fitzsimmons, and several of his assistants were the individuals whose conduct violated his due process rights. In *Buckley*, the Court of Appeals for the Seventh Circuit framed the issues with which it was confronted subsequent to this Court's remand:

> The Supreme Court found "unclear" the "precise contours" of Buckley's claim that the prosecutors violated the due process clause "through extraction of statements implicating him by coercing two witnesses and paying them money." __ U.S. __, 113 S. Ct. at 2619. It evidently expected Buckley to elaborate on remand; so did we. Instead Buckley simply referred us to the very paragraphs of the complaint that perplexed the Justices .... According to the complaint, the interrogation and payments took place early in the investigation, while the prosecutors were just beginning to piece events together. Thus there cannot be absolute immunity. But qualified immunity is available unless the acts violated "clearly established" constitutional norms. *Harlow*, 457 U.S. at 818, 102 S. Ct. at 2738; *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S. Ct. 3034, 3039, 97 L. Ed. 2d 523 (1987). What this complaint alleges does not state a claim under the Constitution, let alone suggest a violation of clearly established rights.

Buckley v. Fitzsimmons, 20 F.3d 789, 794 (7th Cir. 1994), *cert. denied*, 513 U.S. 1085, 115 S. Ct. 740, 130 L. Ed. 2d 642 (1995).

The plaintiff's allegations against the prosecutors in *Buckley* were "the prosecutors repeatedly interrogated two other persons, that the prosecutors paid them for statements inculpating him, that during the interrogations the prosecutors 'coerced' them to finger him and that the accusations Cruz and Hernandez leveled against him are 'obviously false'." *Id.* at 794. In *Buckley*, the Court of Appeals for the Seventh Circuit correctly recognized that Buckley had no remedy under § 1983 against the prosecutors for their alleged use of unreliable, false witness testimony at the Grand Jury and at trial:

> For if the constitutional entitlement is a right to prevent use of the confession at trial (or before the grand jury) then absolute immunity under *Imbler* defeats Buckley's claim. *Obtaining* the confession is not covered by immunity but does not violate any of Buckley's rights; *using* the confession could violate Buckley's rights but would be covered by absolute immunity.... Prosecutors are entitled to absolute immunity for actions as advocates before the grand jury and at trial even if they present unreliable or wholly fictitious proofs. __ U.S. __ n.3, 113 S. Ct. at 2612 n.3 (approving or at least not disturbing our prior holding to that effect).

Buckley, 20 F.3d at 795.

A fair and thorough review of the decision rendered by the United States Court of Appeals for the Seventh Circuit in *Buckley* and the decision rendered by the United States Court of Appeals for the Tenth Circuit in *Clanton* reveals

that no conflict exists. The *Buckley* court and the *Clanton* court agreed that using a confession coerced from a third party against a defendant at trial would infringe upon the defendant's due process rights. In *Buckley*, the Court of Appeals for the Seventh Circuit had to rule upon the question whether the prosecutors' use of the coerced confessions at trial could serve as the basis for the plaintiff's § 1983 claim against the prosecutors. The court held, in accordance with this Court's jurisprudence that "*using the confession could violate Buckley's rights but would be covered by absolute immunity*. . . . Prosecutors are entitled to absolute immunity for actions as advocates before the grand jury and at trial even if they present unreliable or wholly fictitious proofs." *Buckley*, 20 F.3d at 795. (Emphasis added.) Michaels' claim of a conflict between the United States Court of Appeals for the Seventh Circuit and the United States Court of Appeals for the Tenth Circuit is not supported by the case law upon which she relies. The purported dispute between the circuits does not exist.

Here, Michaels alleged that McArdle violated her constitutional rights because she "deliberately and knowingly submitted misleading and false evidence and testimony to the Grand Jury to maliciously and negligently procure an indictment." (Michaels' Amended Complaint at First Count, ¶ 23.) Furthermore, Michaels alleged that McArdle "deliberately, recklessly, negligently and knowingly submitted misleading false evidence and testimony to the trial jury and as a proximate result thereof, Plaintiff Margaret Kelly Michaels was convicted and subsequently incarcerated." (Michaels' Amended Complaint at First Count, ¶ 24.) Michaels' allegations as to McArdle are similar to those advanced by the plaintiff in *Buckley*. It is beyond dispute, as set forth in this brief and in the preceding citation from *Buckley*, that even if Michaels' allegations as to McArdle are true, McArdle is absolutely immune from liability for all of her actions as an advocate whether before a grand jury or at trial.

Michaels' erroneous interpretation of the decision of the Court of Appeals for the Tenth Circuit in *Clanton* is the underlying basis of her claim that the Court of Appeals for the Third Circuit erred in its analysis of McArdle's role in gathering and using the statements that inculpated Michaels. Michaels argues that "pursuant to the mandate of *Clanton*, neither the investigators nor the prosecutors should be immune from liability for their role in obtaining the improper statements." (Pb at 10.) McArdle submits that no such error was made by the Court of Appeals for the Third Circuit.

In *Clanton*, the state actor against whom Clanton brought her § 1983 claim was Cooper, an agent with the Oklahoma State Fire Marshal's Office. *Clanton*, 129 F.3d at 1152. Inasmuch as Cooper never performed any "quasi-judicial" functions, the court never had to consider whether he was absolutely immune from liability. Rather, the question for the court's consideration was whether Cooper was entitled to the protection of qualified immunity. *Id*. at 1152.

The threshold consideration in determining the viability of the affirmative defense of qualified immunity to a public official's conduct is "whether the plaintiff's claims make out a constitutional violation." *Assaf v. Fields*, 178 F.3d 170, 174 (3d Cir. 1999). In this matter, the Court of Appeals for the Third Circuit held unanimously that "the district court did not err in concluding that Michaels did not demonstrate a violation of her constitutional rights when the defendants employed improper interview techniques with the children." *Michaels v. State of New Jersey, et al.*, No. 99-5486 (filed June 5, 2000), at Michaels' App. 12. McArdle submits that the Court of Appeals' ruling below is a correct application of the relevant law to the facts of this matter and should end this Court's inquiry into the issue of qualified immunity. However, assuming *arguendo* that Michaels' constitutional rights were violated by the interrogation techniques employed in the criminal prosecution, McArdle would still

be entitled to the protection of qualified immunity for her actions in obtaining the allegedly improper statements.

In *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982) this Court held "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." 457 U.S. at 818, 102 S. Ct. at 2738. The district court in this matter held that McArdle was entitled only to qualified immunity for certain of her actions in the criminal matter. "Prior to the decision to seek an indictment, Sencer-McArdle was functioning as an investigator or engaging in investigative activities, conduct not protected by absolute immunity." *Michaels v. New Jersey*, 50 F. Supp. 2d 353, 360 (D.N.J. 1999).

The "objective reasonableness" test this Court articulated in *Harlow* requires a court's review of "not only the currently applicable law, but whether the law was clearly established at the time an action occurred." 457 U.S. at 818, 102 S. Ct. at 2738. This Court further explained the "objective reasonableness" test in *Malley v. Briggs*, 475 U.S. 335, 106 S. Ct. 1092, 89 L. Ed. 2d (1986). In *Malley*, this Court explained that "defendants will not be immune if, on an objective basis, it is obvious that no reasonably competent officer would have concluded that a warrant should issue; but if officers of reasonable competence could disagree on this issue, immunity should be recognized." 475 U.S. at 341, 106 S. Ct. at 1096.

Here Michaels cannot articulate a colorable argument that the district court erred when it determined that McArdle's interrogation techniques did not violate an accepted standard. The district court properly reviewed and examined what, if any, applicable standards existed in 1985 regarding the

interrogation of young children who were the alleged victims of child abuse. In this regard, the district court's reliance upon *Myers v. Morris*, 810 F.2d 1437 (8th Cir. 1987), a case factually analogous to Michaels' case, was appropriate. In *Myers*, the Court of Appeals for the Eighth Circuit framed the issue before it as follows:

> The plaintiffs have alleged however that the deputies' interrogation conduct was so improper that in essence only fabricated accusations could have emerged from the interview sessions.
>
> We examine the specific interrogation conduct identified in the record to determine whether it so exceeded accepted legal norms for the questioning of witnesses and victims that the interrogating detectives knew or should have known their conduct would violate the rights of accused persons. *We do not think it sufficient for purposes of this inquiry to determine whether fourth, fifth, sixth and fourteenth amendment rights were clearly established in 1984. Our inquiry is whether from a 1984 perspective the law was clearly established that the conduct in which the deputies engaged would violate such rights.*

Myers, 810 F.2d at 1458-59. (Emphasis added.)

In the courts below, Michaels argued that the Supreme Court of New Jersey's opinion in the criminal matter, *State v. Michaels*, 136 N.J. 299 (1994), settled the question as to whether McArdle could rely upon the affirmative defense of qualified immunity. Michaels argued that the Supreme Court of New Jersey's determination that the State's investigation, particularly the manner in which the children were interviewed, was "professionally inept" stripped

McArdle of her entitlement to the protection of qualified immunity. However, Michaels failed to address the sources upon which the Supreme Court of New Jersey relied in making its determination that the manner in which the children were interviewed was "professionally inept".

The Supreme Court of New Jersey cited from a variety of learned treatises, studies of children, rules of evidence and case law to reach its conclusion that the State's investigation of the sexual abuse allegations against Michaels was "professionally inept". However, under the *Harlow* test of "objective reasonableness" the Supreme Court of New Jersey's determination that the investigation was "professionally inept" does not equate with a finding that her actions were "plainly incompetent" for purposes of determining her entitlement to qualified immunity. A critical component of a court's determination that an actor's conduct was "plainly incompetent" is an assessment of the conduct in light of the clearly established law at the time the conduct occurred. *Harlow*, 457 U.S. at 818, 102 S. Ct. at 2738. That assessment was not part of the Supreme Court of New Jersey's opinion.

Instead, the Supreme Court of New Jersey relied upon the materials that had developed on the subject of the best method for interviewing children who were the alleged victims of sexual abuse during the nine years subsequent to the State's investigation into the sexual abuse allegations against Michaels and prior to the Court's decision. *State v. Michaels*, 136 N.J. at 309-12. Finally, the Court relied upon what it referred to as "judicial recognition of the very same concerns expressed in the academic literature and addressed by the guidelines established by governmental authorities with respect to the improper interrogation of alleged child sex abuse victims", *id.* at 312, to support its conclusion regarding the impropriety of the interviews in Michaels' case. All of the cases cited by the New Jersey Supreme Court were

decided in either 1990 or 1991. *Id.* The Court's conclusion that "the use of coercive or highly suggestive interrogation techniques can create a significant risk that the interrogation itself will distort the child's recollection of events, thereby undermining the reliability of the statements and subsequent testimony concerning such events", *id.*, was based upon its review and assessment of all of the aforementioned materials.

The district court observed, correctly, that "unfortunately for Michaels herself, the *Michaels* case inspired a change in the law." *Michaels*, 50 F. Supp. 2d at 364-65. Furthermore the district court acknowledged the existence of an important distinction in the governing standard as between Michaels' claims as a defendant in the criminal action and her claims as a plaintiff in a § 1983 civil action:

> [T]here is an important distinction between what the Appellate Division and the Supreme Court of New Jersey did and said on the *Michaels* appeal and what Michaels asks this court to do today. Both of the New Jersey higher courts that dealt with the case were permitted to enjoy the benefit of hind-sight; this court is not. Indeed, the information on which the Appellate Division and the New Jersey Supreme Court relied in 1993 and 1994, respectively, came from articles and journals published ***after*** Michaels was found guilty.

Michaels, 50 F. Supp. 2d at 365. (Emphasis added.)

A clear distinction can be drawn between McArdle's actions in this matter and Agent Cooper's actions in *Clanton*. As the district court noted in this matter "officials are not liable for bad guesses in gray areas; they are liable for transgressing bright lines." *Michaels*, 50 F. Supp. 2d at 365. The district court concluded "considering what little was

known in the mid-1980's, this court cannot say that the defendants transgressed any 'bright lines'." *Id.*

Conversely, in *Clanton* the Court of Appeals for the Tenth Circuit ruled that Agent Cooper had, in fact, transgressed a bright line regarding the use of a coerced confession. It was that determination that stripped him of qualified immunity. In *Clanton*, after determining that Cooper's false representation to a suspect that physical evidence linked the suspect to the crime did not render the confession coerced, *Clanton*, 129 F.3d at 1158, the court turned its attention to the remaining allegation against Cooper:

> Cooper also told Michael that he would get a twenty-five year sentence if he didn't confess, but would "get off lightly" if he confessed to a pattern of events suggested by Cooper. . . .
>
> Under Supreme Court and Tenth Circuit precedent, a promise of leniency is relevant to determining whether a confession was involuntary and, depending on the totality of the circumstances, may render a confession coerced.

Clanton, 129 F.3d at 1158-59.

The Court of Appeals then cited a number of United States Supreme Court and Tenth Circuit opinions that explicitly stated that what Cooper did rendered the confession he had obtained coerced. *See Clanton*, 129 F.3d at 1159. In deciding that Cooper's actions were, therefore, not protected by qualified immunity, the Court proclaimed

> all of these opinions were released before the events in this case. Thus it was clearly established at the time of the interrogation that a promise of leniency may render a confession involuntary if it was sufficiently compelling and linked to the

> confession so that it could be said that the defendant's will was overcome by the offer.

Clanton, 129 F.3d at 1159.

Thus, for all of the foregoing reasons, it is evident that Michaels' position that there is a conflict between the various Courts of Appeals on the relevant issues herein is completely devoid of merit. No such dispute exists. Therefore the petition for a writ of certiorari to address this non-existent conflict must be denied.

C. Michaels' Claim That Certiorari Is Necessary Here To Ensure That She Has The Right To § 1983 Redress Is Absolutely Without Merit And Must Be Rejected By This Court.

Finally, McArdle submits that this Court must flatly reject Michaels' contention that certiorari is necessary here to ensure that litigants, such as herself, receive redress under § 1983. Michaels contends that the Third Circuit's conclusion that she received redress through the setting aside of the criminal conviction and dismissal of the charges against her is "inconsistent with the intent of 42 U.S.C. § 1983 action. It leaves a whole class of wrongfully accused defendants without civil recourse; which is also contrary to the intent of § 1983." (Pb at 11.) Not surprisingly, Michaels cites no legal authority in support of this argument. This is so even though Michaels is asking this Court to do nothing less than ignore its own precedent so that it might create this exceptional remedy for her.

In *Imbler*, this Court expressed its understanding of the rationale for making a prosecutor absolutely immune from liability for actions taken within the scope of her prosecutorial duties as follows:

> The office of public prosecutor is one which must be administered with courage and independence. Yet how can this be if the prosecutor is made subject to suit by those whom he accuses and fails to convict? To allow this would open the way for unlimited harassment and embarrassment of the most conscientious officials by those who would profit thereby. There would be involved in every case the possible consequences of a failure to obtain a conviction. There would always be a question of possible civil action in case the prosecutor saw fit to move for dismissal of the case. The apprehension of such consequences would tend toward great uneasiness and toward weakening the fearless and impartial policy which would characterize the administration of this office. The work of the prosecutor would thus be impeded, and we would have moved away from the desired objective of stricter and fairer law enforcement.

424 U.S. at 423-24, 96 S. Ct. at 991-92.

The concern of protecting prosecutors from civil liability in § 1983 actions that were brought against them for actions undertaken in their role as an advocate was also addressed by this Court in *Buckley*:

> In particular [in *Imbler*] we expressed concern that fear of potential liability would undermine a prosecutor's performance of his duties by forcing him to consider his own potential liability when making prosecutorial decisions and by diverting his "energy and attention . . . from the pressing duty of enforcing the criminal law." *Imbler*, 424 U.S. at 424-25. Suits against prosecutors would devolve into "a virtual retrial of the criminal offense in a new forum," *id.* at 425, and would undermine the vigorous enforcement of the law by providing a prosecutor with an incentive not "to go forward with a close case where an acquittal likely would trigger a suit against him for damages." *Id.* at 424 and n.26.

Buckley, 509 U.S. at 2614 n.4, 113 S. Ct. at 2614 n.4.

Finally, in *Kalina v. Fletcher*, 522 U.S. at 131, 118 S. Ct. at 510 (1997), this Court reiterated its position that "[w]e do not depart from our prior cases that have recognized that the prosecutor is fully protected by absolute immunity when performing the traditional functions of an advocate."

Nevertheless, Michaels contends that she has been unjustly denied § 1983 redress and that the Third Circuit's conclusion that she has already received her remedy is erroneous. Neither the applicable law nor the facts of this case support this contention. In *Mitchell v. Forsyth*, 472 U.S. 511, 105 S. Ct. 2806, 86 L. Ed. 2d 411 (1985), the Court observed that a component of an official's entitlement to the protection of absolute immunity is the determination as to whether there exists "self-correction" within the system where the alleged misconduct occurred.

> [M]ost of the officials who are entitled to absolute immunity from liability for damages are subject to other checks that help to prevent abuses of authority from going unredressed. . . . The judicial process is largely self-correcting: procedural rules, appeals and the possibility of collateral challenges obviate the need for damages actions to prevent unjust results.

472 U.S. at 522, 105 S. Ct. at 2813.

Here, the improper actions Michaels alleges that McArdle undertook during the criminal prosecution of Michaels more than a decade ago have been remedied by the appellate courts of the State of New Jersey. On March 26, 1993, the Appellate Division of the Superior Court of New Jersey reversed the plaintiff's criminal conviction. *State v. Michaels*, 264 N.J. Super. 579 (App. Div. 1993). The Appellate Division's decision was affirmed by the Supreme Court of New Jersey on June 23, 1994. *State v. Michaels*, 136 N.J. 299 (1994). In *Giuffre v. Bissell*, 31 F.3d 1241 (3d Cir. 1994), the Court stated that one of the reasons that a prosecutor's decision to initiate a prosecution is a decision for which the prosecutor is absolutely immune from liability is that the criminal justice system has its own mechanism for protecting a falsely-accused defendant. "Harm to a falsely charged defendant is remedied by safeguards built into the judicial system — probable cause hearings, dismissal of the charges — and into the state codes of responsibility." *Giuffre*, 31 F.3d at 1252.

The position articulated by the Third Circuit Court of Appeals in *Giuffre* is consistent with the *Imbler* Court's clear placement of a greater value on protecting the fairness of the criminal justice system as a whole rather than on permitting the recovery of monetary damages against a prosecutor for performance of her duties as an advocate. That is so even in a case where the allegedly aggrieved defendant was convicted of a crime. In *Imbler*, this Court recognized that "[v]arious post-trial procedures are available to determine whether the accused has received a fair trial. These procedures include the remedial powers of the trial judge, appellate review, and state and federal post-conviction collateral remedies." 424 U.S. at 427, 96 S. Ct. at 993. The *Imbler* Court further recognized that

> in all of these the attention of the reviewing judge or tribunal is focused primarily on whether there was a fair trial received under law. The focus should not be blurred by even the subconscious knowledge that a post-trial decision in favor of the accused might result in the prosecutor's being called upon to respond in damages for his error or mistaken judgment.

Id.

The *Imbler* Court determined "the considerations outlined above dictate the same absolute immunity under § 1983 that the prosecutor enjoys at common law." 424 U.S. at 427, 96 S. Ct. at 993. The Court recognized "this immunity does leave the genuinely wronged defendant without civil redress against a prosecutor whose malicious or dishonest action deprives him of liberty." *Id.* The Court nevertheless concluded "the alternative of qualifying a prosecutor's immunity would disserve the broader public interest. It would prevent the vigorous and fearless performance of the prosecutor's duty that is essential to the proper functioning of the criminal justice system." *Id.*

Here, the Appellate Division of the Superior Court of New Jersey reversed Michaels' criminal conviction and the New Jersey Supreme Court affirmed the reversal. The district court observed

> [h]aving failed to convince the trial judge that remedy was required because improper interrogation techniques which led to unreliable evidence had been used, Michaels utilized the appellate process. Slow as that process may have seemed to her, it was the appropriate method by which to challenge those techniques and that evidence.

Michaels, 50 F. Supp. 2d at 363.

The Court of Appeals for the Third Circuit also recognized that any harm Michaels may have suffered as a result of McArdle's actions had been addressed and remedied by New Jersey's criminal justice system. "Michaels' conviction was reversed and the serious charges against her were dismissed because the children's testimony was unreliable." *Michaels v. State of New Jersey, et al.*, No. 99-5486 (filed June 5, 2000), at Michaels' App. 10. Furthermore, McArdle respectfully submits that this Court must recognize the extensive pre-trial motions and hearings that were conducted in the criminal case as to the admissibility of the interviews of the various children.

In its 1993 opinion Appellate Division of the Superior Court of New Jersey "created" a "suggestibility hearing" for use in future prosecutions of alleged child sexual abusers. *State v. Michaels*, 264 N.J. Super. 579, 631-35. (App. Div. 1993). The record in the district court and the Court of Appeals for the Third Circuit in this matter clearly revealed that the hearing that the Appellate Division "created" in 1993 did in fact occur, pre-trial, in Michaels' criminal prosecution. The trial judge in the criminal matter conducted a hearing on the issue and denied Michaels' pre-trial motion to dismiss the indictments due to the alleged improper suggestibility of the interviewers' techniques. Thus the "remedy" proposed by the Appellate Division in 1993 had been employed by the trial court several years earlier. Furthermore, after he conducted the pre-trial hearing, the trial judge in the criminal matter listened to all of the audio tapes and reviewed all of the children's statements. Subsequent to doing so, the trial judge ruled that the interviews were reliable and not the product of impermissible suggestion. Thus the trial judge ultimately ruled that the children's statements were admissible.

Michaels' right to pursue appellate relief from Judge Harth's ruling, which ultimately resulted in the vacation of her conviction and the dismissal of the charges against her, serves to underscore the totality of the remedy she has already received and the correctness of the Court of Appeals' position.

CONCLUSION

Review on a writ for certiorari is not a matter of right but of judicial discretion. It is Michaels' burden to provide this Court with compelling reasons for granting certiorari. McArdle respectfully submits that a fair review of the record in this case leads to but one conclusion: Michaels has not provided any compelling reason for granting certiorari in this matter. Michaels' dissatisfaction with the Court of Appeals for the Third Circuit's unanimous affirmation of the district court's decision to grant summary judgment in McArdle's favor is understandable. However, a litigant's dissatisfaction with a court's decision cannot stand as the sole supporting basis for asking this Court to exercise its discretion and grant a writ for certiorari. Michaels' position is inconsistent with and contrary to this Court's longstanding jurisprudence that has addressed a public official's reliance upon the affirmative defenses of absolute immunity and qualified immunity. The decision of the Court of Appeals for the Third Circuit was a correct application of the relevant law to the facts of this particular case. The petition should therefore be denied.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

MARGARET KELLY MICHAELS *v.* GEORGE McGRATH ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 00–361. Decided January 16, 2001

The petition for a writ of certiorari is denied.

Justice THOMAS, dissenting from denial of certiorari.

Petitioner Margaret Michaels worked as a teacher's aide in a nursery school in Maplewood, New Jersey. Shortly after petitioner left the school, one of the children (then four years old) made a comment that a nurse in his pediatrician's office interpreted as an allegation of sexual abuse. See *State* v. *Michaels*, 264 N. J. Super. 579, 591, 625 A. 2d 489, 495 (1993). The physician examined the child but found no evidence of abuse. Nonetheless, based solely on the child's statements, a prosecutor and several investigators, respondents here, began an extensive investigation. Respondents interviewed virtually all of the children with whom petitioner could have had contact. Employing peer pressure, making threats, and asking leading or suggestive questions, they obtained stories of sexual abuse that "ranged from relatively minor accounts of touching to virtually incomprehensible heinous and bizarre acts." *Id.*, at 592, 625 A. 2d, at 495. After a 9-month trial petitioner was convicted of 115 counts and sentenced to 47 years in prison.

After petitioner had served five years of her sentence, a New Jersey appellate court reversed her conviction on the ground that respondents' investigative techniques were improper. See *id.*, at 620–635, 265 A. 2d, at 510–519. As the court noted, even respondents apparently realized that their interrogation techniques "caused certain children to

use their imagination and stray from reality." *Id.*, at 621, 625 A. 2d, at 511. The New Jersey Supreme Court affirmed, holding that "the interviews of the children were highly improper and employed coercive and unduly suggestive methods." *State* v. *Michaels*, 136 N. J. 299, 315, 642 A. 2d 1372, 1380 (1994). It pointed out that "[t]he interrogations undertaken in the course of this case utilized most, if not all, of the practices that are disfavored or condemned by experts, law enforcement authorities and government agencies." *Id.*, at 313, 642 A. 2d, at 1379.

Petitioner then brought this action against respondents under Rev. Stat. §1979, 42 U. S. C. §1983. The District Court granted respondents' motion to dismiss, see *Michaels* v. *New Jersey*, 50 F. Supp. 2d 353 (NJ 1999), and the Third Circuit affirmed, 222 F. 3d 118 (2000). The Third Circuit held that recovery was barred because the coercion of child witnesses was a violation only of the *witnesses'* rights, and not of any right held by petitioner. And although petitioner's due process rights were violated when the testimony was used at trial, the court held that the presentation of testimony fell squarely within the doctrine of absolute prosecutorial immunity. See *id.*, at 121–122, citing *Imbler* v. *Pachtman*, 424 U. S. 409 (1976).

This view accords with that of the Seventh Circuit, see *Buckley* v. *Fitzsimmons*, 20 F. 3d 789 (1994), but it is in tension with the approach taken by at least two other Circuits. See, *e.g.*, *Clanton* v. *Cooper*, 129 F. 3d 1147 (CA10 1997); *Zahrey* v. *Coffey*, 221 F. 3d 342 (CA2 2000). In *Zahrey*, the Second Circuit took the position that a plaintiff does state a claim under §1983 when he shows that prosecutorial misconduct in gathering evidence has led to a deprivation of his liberty. The intervention of a subsequent immunized act by the same officer does not break the chain of causation necessary for liability.

I believe that the Second Circuit's approach is very likely correct, and that the decision below leaves victims of egregious prosecutorial misconduct without a remedy. In any event, even if I did not have serious doubt as to the correctness of the decision below, I would grant certiorari to resolve the conflict among the Courts of Appeals on this important issue. I respectfully dissent.